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In The

Supreme Court of the United States

October Term, 1973

No. ~~74~~ - 123

IZAAK WALTON LEAGUE OF AMERICA and ROBERT L. HERBST, Commissioner of Natural Resources of the State of Minnesota,

Petitioners,

vs.

GEORGE W. ST. CLAIR, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

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No. ———

IZAAK WALTON LEAGUE OF AMERICA and ROBERT L. HERBST, Commissioner of Natural Resources of the State of Minnesota,

Petitioners,

vs.

GEORGE W. ST. CLAIR, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Izaak Walton League of America, a not-for-profit corporation, and Robert L. Herbst, Commissioner of Natural Resources of the State of Minnesota, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on May 17, 1974. The respondents in the above case are George W. St. Clair, deceased, by his successors in interest, Robert E. Gardner, Evelyn A. Gardner, William A. Gardner, Marea B. Gardner, Jane G. Head, Murdock Head, the United States Secretary of Agriculture, the Chief of the United States Forest Service and the Supervisor of the Superior National Forest.

CITATION OF OPINIONS BELOW

The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, pp. A-1 - A-11, is reported in 497 F.2d 849. The opinion of the District Court, printed in Appendix B hereto, *infra*, pp. B-3 - B-37, is reported in 353 F. Supp. 698.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 17, 1974. (Appendix A, p. A-2, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Congress has the power and authority to enact zoning legislation for environmental protection and preservation and thereby restrict and limit an owner's use of private property.

2. Whether the National Wilderness Preservation Act of 1964 prohibits mining operations and other commercial activities within the statutorily-designated federal wilderness areas.

3. Whether federal and Minnesota state laws prohibit mining operations and other commercial activities within the Boundary Waters Canoe Area of the Superior National Forest.

STATUTES INVOLVED

The principal statutory provisions involved are Sections 1 - 7 of The National Wilderness Preservation Act of 1964, Pub. L. 88-577, 78 Stat. 890 (16 U.S.C. §§1131-

1136). They are printed in Appendix C, *infra*, pp. C-1 - C-15.

Other federal statutory provisions involved are Sections 1 - 3 of Shipstead-Newton-Nolan Act, c. 881, 46 Stat. 1020 (1930); Sections 1 - 6 of Thye-Blatnik Act, c. 593, 62 Stat. 568 (1948); and Sections 1 - 3 of Humphrey-Thye-Blatnik-Andresen Act, c. 425, 70 Stat. 326 (1956). Minnesota statutory provisions involved are *Minn. Stat.* §1.041; *Minn. Stat.* §1.045; *Minn. Stat.* §§84.43-84.-521; *Minn. Stat.* §92.45 and *Minn. Stat.* §110.13. They are also printed in Appendix C, *infra*, pp. C-15 - C-34.

STATEMENT OF THE CASE

The Izaak Walton League of America, a non-profit organization formed in 1922, commenced a declaratory judgment action in District Court on December 23, 1969. The jurisdiction of the District Court was invoked under the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202; the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* and 28 U.S.C. §§1131, 1332, 1346 and 1361. The value of the rights which were the subject of the litigation are in excess of $10,000.00.

The Izaak Walton League sought to enjoin permanently respondent St. Clair from attempting to conduct further exploratory mining operations in the Boundary Waters Canoe Area (BWCA) of the Superior National Forest. The Izaak Walton League also sought to enjoin permanently the responsible agents of the State of Minnesota and of the United States Department of Agriculture and United States Forest Service from permitting St. Clair to engage in exploratory mining operations or other commercial activity within the borders of the BWCA.

The State of Minnesota, through its Commissioner of Natural Resources, asserted a cross-complaint against respondents in which it supported the requested permanent injunction. The position of the State of Minnesota differed from the Izaak Walton League only in its allegation that commercial activity should be allowed in the BWCA in the event of national emergency. Subsequently, the State of Minnesota moved to amend its answer and cross-complaint to assert that the lands in which St. Clair claims mineral rights were, prior to the year 1900, obtained fraudulently from the public domain under the then applicable federal homesteading law and therefore no private titles to the lands can or do exist and title remains in the United States. The District Court denied leave to so amend on May 15, 1972 and held as a matter of law that, even if established, such facts at this date would not constitute a defense in view of the statute of limitations. It indicated, however, that the State of Minnesota had presented a prima facie case of fraud which could be asserted by the federal government under the public trust doctrine.

The District Court then issued a permanent injunction on January 5, 1973 enjoining St. Clair from any exercise of his alleged mineral rights, and enjoining the federal and state governmental agencies from permitting any exercise by St. Clair of his rights. (Appendix B, *infra*, pp. B-1 - B-3 together with its memorandum opinion Appendix B, *infra*, pp. B-4 - B-37). The District Court held that the federal government possessed the power and authority to zone the land included within the BWCA. (Appendix B, *infra*, p. B-20). It further held that Congress, in the National Wilderness Preservation Act of 1964, intended to zone out of statutorily-designated national wilderness areas any and all

mineral exploration and removal by reason of its findings that mining activities were incompatible with the wilderness objectives of the law.

Respondents, after the District Court denied their motions for amended findings, filed notices of appeal to the Circuit Court of Appeals for the Eighth Circuit on May 7, 1973 (St. Clair) and on June 11, 1973 (federal respondents). The State of Minnesota on May 21, 1973 also filed a notice of appeal requesting a review of the District Court's denial of its motion to amend its cross-claim.

The Circuit Court determined that the doctrine of primary jurisdiction should have been applied and that the question of whether a permit should be issued for exploratory mining operations should first be determined by the United States Forest Service. The District Court judgment was reversed and the cause was remanded to the District Court with instructions that the Forest Service be allowed to determine upon proper application whether a permit should be issued. (Appendix A, *infra*, p. A-11). The Court expressed no opinion as to the correctness of the District Court's decision on all of the issues other than the question of primary jurisdiction.

In addition, the Court affirmed the District Court's refusal to allow the State of Minnesota to amend its cross-claim. (Appendix A, *infra*, pp. A-10 - A-11). It did not decide, however, the issues of whether the State has standing to assert the claim or whether the fraud claim is barred by the statute of limitations. The Court decided that the resolution of these issues should await their presentation in an appropriate action.

The parties to this lawsuit have stipulated to the following basic facts relative to the nature of the BWCA and

the events leading up to the initiation of this lawsuit. The BWCA comprises a total land and water wilderness area of 1,031,204 acres all of which is located within the Superior National Forest in northeastern Minnesota. Approximately 71.3% of the area is owned by the United States, 26.3% including lake beds, by the State of Minnesota, 1.4% by counties and approximately 1% by private persons. However, the United States owns only 44% of the subsurface mineral rights while the State of Minnesota and counties own 26.3% and 1.4% respectively. The remaining 28.3% of the subsurface mineral rights, including the claims of St. Clair, are owned by private persons.

Substantial public expenditures for the purchase of surface lands and for improvements have been made since the establishment of the Superior National Forest in 1909. The visitor use of the hundreds of lakes and streams included within the BWCA has increased considerably over the past 25 years. In 1945, for example, there were 6,320 visits to the BWCA for a total of 22,625 man days. In 1969, there were 113,100 visits to the BWCA for a total of 780,700 visitor days. All former private resorts in the area have now been or are being removed and closed. In addition, travel in the area under 4,000 feet by airplane is prohibited. Travel by motor boat or snowmobile is limited and travel by any other motorized vehicle is prohibited except for permitted logging vehicles in the peripheral or "portal zone." Similarly, the establishment of camps is rigidly regulated.

St. Clair was permitted by the Forest Service to enter the BWCA during the summer of 1969 for purposes of conducting surface mineral exploration. In December, 1969, St. Clair gave notice to the Forest Service of his plans

to commence core drilling, to use mechanized equipment and to establish permanent camps. The Forest Service, after receipt of this notice from St. Clair, requested information concerning St. Clair's right and title to the lands upon which he intended to drill. Prior to further action on St. Clair's application, the Izaak Walton League commenced the present lawsuit.

REASONS FOR GRANTING THE WRIT

1. Whether Congress has the power and authority to enact zoning legislation for environmental protection and preservation and thereby restrict and limit an owner's use of his private property is an issue of increasing national importance. This issue is particularly important to the interpretation and administration of federal laws relating to the environment. The District Court in this case determined that Congress did have such zoning power and could prohibit owners of subsurface mineral rights from conducting mineral exploration activities within the Boundary Waters Canoe Area of Minnesota (BWCA). The District Court determined that various federal statutes, including the National Wilderness Preservation Act of 1964, Pub. L. 88-577, 78 Stat. 890 (16 U.S.C. §1131 *et seq.*), popularly known as the Wilderness Act (Appendix C, *infra*, pp. C-1 - C-15), had zoned the BWCA for wilderness use and that any mineral exploration was totally incompatible with the wilderness zoning. The United States Court of Appeals for the Eighth Circuit ruled that the United States Forest Service should conduct an evidentiary hearing to determine whether and to what extent mining is compatible with the wilderness of the BWCA.

The Court of Appeals, in effect, has decided the critical zoning issue adversely to these petitioners. It is petitioners'

contention that under existing federal laws the Forest Service cannot even consider the issuance of any permits for exploratory mining activities within the BWCA. The federal government's zoning enactments have established that mining is incompatible with wilderness regardless of the facts concerning the particular mining activities. Therefore, to allow the Forest Service under the doctrine of primary jurisdiction to even entertain the possibility of permitting mining activities effectively decides that wilderness values and mining activities *may* be compatible or consistent. This rejects the legislative determination that explicit federal zoning has been established.

This case gives this Court the opportunity to settle important and significant issues associated with the establishment and use of federal zoning restrictions and limitations. The issues are nationally important because zoning is involved in recently-enacted and proposed Congressional and administrative environmental, mining and land-use regulations. The basic purpose of such regulations is to restrict and limit in varying degrees the rights of property owners affected by such regulations. If Congress has the power to further the public welfare by zoning and if such restrictions are in fact zoning provisions, then such restrictions under traditional zoning law concepts do not constitute a taking of property under the "taking clause" of the Fifth Amendment to the United States Constitution. This Court therefore has the opportunity not only to review the currently undecided issue of whether Congress has zoning power but also to re-examine the limits of the Fifth Amendment on governmental bodies' power to control private property for environmental or other public purposes through zoning.

Decisions on these issues are needed at this time to guide Congress and the federal regulatory agencies charged with responsibilities for national environmental matters. Similarly, state and local governments, property owners and other affected parties need a definitive answer to these unclear zoning issues in order to administer effectively the expanding volume of laws and regulations affecting environmental matters. Russell E. Train, Chairman of the Council on Environmental Quality, expressed this same concern for definitive judicial guidance. On July 9, 1973, he wrote the following as an introduction to a study prepared and written for the Council on Environmental Quality:

> Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights. If this is a highly charged emotional issue, it is no less serious a matter of national concern, as evidenced by the current debate over land use legislation in the Congress and in the State legislatures throughout the county.[1]

The authors of the study also pointed out the clear need for judicial direction in resolving "taking" issue conflicts. They said:

> As the regulation of land use becomes an increasingly important component of programs for enhancing environmental quality the constitutional parameters within which land use regulation must operate become increasingly important.[2]

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[1]Train, *Foreword* to *F. Bosselman, D. Callies, J. Banta, The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* (1973) (GPO Bookstore Stock No. 4111 - 00017).

[2]*Id.*, at i.

2. The second question presented herein concerning the interpretation of the Wilderness Act is also nationally-significant, timely and important. Conflicting provisions of that law raise the issue of whether Congress zoned statutorily-designated national wilderness areas in such a manner as to prohibit mining activities by owners of subsurface mineral interests located within such areas. The District Court determined that the Wilderness Act and accompanying administrative regulations contain within themselves fundamental inconsistencies. (Appendix B, *infra*, pp. B-33 - B-36). The Court said:

> There is an inherent inconsistency in the Congressional Act and it falls in the lap of the court to determine which purpose Congress deemed most important and thus intended. In this court's opinion, the Wilderness objectives override the contrary mineral right provision of the statute. . . . Otherwise, the Congressional Act is a nullity. (Appendix B, *infra*, p. B-35).

No other courts have recognized or resolved this inherent inconsistency in the Wilderness Act. The internationally-unique BWCA is one of the statutorily-designated wilderness areas in which the wilderness-mining issue now exists. With the growing demand for minerals, this question of statutory interpretation is certain to arise in still other wilderness areas. For this reason and because the Court of Appeals expressed no opinion as to the correctness of the District Court's decision on the interpretation of the Wilderness Act (Appendix A, *infra*, pp. A-9 - A-10), this Court should resolve the inherent inconsistency of Congress for all other affected national wilderness areas.

In addition, the action of the Court of Appeals in remanding the case for an administrative hearing provided

no judicial guidance in resolving the regulations contained in the Wilderness Act. The decision of the Court of Appeals also conflicts with language in the decision of the Tenth Circuit Court of Appeals in *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) which also interpreted the Wilderness Act. In reference to the issue of adding wilderness areas contiguous to designated wilderness units to the Wilderness Preservation System, the Tenth Circuit determined that the legislative history of the law clearly intended to limit agency discretion when such discretion could be used to destroy Congressionally-defined and protected wilderness values. 448 F.2d 793 at 797.

There can be no question that the Forest Service needs a definitive interpretation of the inconsistent provisions of the Wilderness Act at this time. The Forest Service has admitted in the course of this lawsuit that it is concerned about the interpretation of the federal laws applicable to the BWCA. The Circuit Court's opinion contained the following statement:

> The Forest Service says that the subsurface private ownership of mineral rights in the BWCA represents a serious problem for the management of the BWCA and recognizes that "[a]ny mineral exploration or extraction would jeopardize the surface resources and wilderness character of the area." (Appendix A, *infra*, p. A-4).

In the District Court opinion the Forest Service was instructed that the wilderness objectives contained in the Wilderness Act and other federal and state laws applicable to the BWCA were predominant over the inherently-inconsistent provisions apparently allowing mining activity.

However, the Court of Appeals then advised the Forest Service that the Court did not express an opinion on the District Court's legal interpretations. Instead, the Forest Service was told that it should determine, upon proper application, whether a permit for mining activities should be issued. The only guidance from the Court of Appeals was to determine "whether or not the planned mining activities were compatible with the wilderness character of the area." (Appendix A, *infra*, p. A-8). Certainly, the decision of the Court of Appeals did not attempt to limit the discretion of the Forest Service even though the discretion could effectively destroy the wilderness values of the BWCA or of other similarly-situated wilderness areas.

In this respect, the order of the Court of Appeals serves to burden the administrative agencies and courts with further proceedings. Its decision fails to recognize and define the nature and extent of federal zoning power. If the decision is now left to stand, the Forest Service would have no judicial guidance as to the extent to which the Wilderness Act zones private property rights. If a mining permit is granted, according to the Court of Appeals decision, this lawsuit would either be reactivated to determine these issues or petitioners would be required to institute another lawsuit. This Court should decide now the legal issues which were presented on appeal to the Court of Appeals. The Forest Service needs meaningful and significant judicial guidance for purposes of reviewing current and future mining permit applications for not only the BWCA but for all units of the wilderness preservation system under its jurisdiction.

As a result of the decision of the Court of Appeals in this case, the Forest Service included the following summary statement about mining activity in its Land Use

Management Plan for the Boundary Waters Canoe Area transmitted on June 28, 1974 to the Council on Environmental Quality.[3]

> Exploration for, and the extraction of minerals will be limited or prohibited *to the extent permitted by law* where determined to be incompatible with wilderness or other environmental values. *Id.* p. 4 (Emphasis added.)

3. The third question presented in this petition relates to the interpretation of treaties and numerous federal and state laws which specifically regulate and treat the internationally-unique BWCA. It is petitioners' contention that federal and state laws enacted prior to the Wilderness Act and the Wilderness Act itself prohibit mining operations and other commercial activities within the BWCA. In this regard, the Court's attention is directed to sections 4(c), 4(a)(2) and 4(d)(5) of the Wilderness Act of 1964, Pub. L. 88-577, 78 Stat. 890, 16 U.S.C. §§1133(c), 1133 (a)(2) and 1133(d)(5) (Appendix C, *infra*, pp. C-8, C-9, C-12) and to the Shipstead-Newton-Nolan Act, c. 881, 46 Stat. 1020 (1930); the Thye-Blatnik Act, c. 593, 62 Stat. 568 (1948); and the Humphrey-Thye-Blatnik-Andresen Act, c. 425, 70 Stat. 326 (1956). (Appendix C, *infra, pp.* C-15 - C-22). The Court's attention is also directed to the following Minnesota laws dealing with the BWCA: *Minn. Stat.* §1.041; *Minn. Stat.* §1.045; *Minn. Stat.* §§ 84.43-84.521; *Minn. Stat.* §92.45 and *Minn. Stat.* §110.-13. (Appendix C, *infra*, pp. C-22 - C-34).

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[3]*Boundary Waters Canoe Area Management Plan and Environmental Statement* (Prepared in accordance with §102 (2) (c) of Pub. L. 91-190 by Jay H. Cravens, Regional Forester, USDA-Forest Service, Eastern Region, 633 West Wisconsin Avenue, Milwaukee, Wisconsin 53203).

These treaties and federal and state laws will be urged and cited by petitioners if certiorari is granted in support of the proposition that Congress and the State of Minnesota have specifically and effectively created regulations which have zoned the BWCA in such a manner as to prohibit mining activities by owners of subsurface mineral interests located within the BWCA. The District Court decision similarly reviewed and discussed the significance of these same federal and state legislative acts. (Appendix B, *infra*, pp. B-8 - B-16 - B-18 - B-19).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 12, 1974.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 73-1407

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

IZAAK WALTON LEAGUE OF AMERICA,
Appellee,

vs.

GEORGE W. ST. CLAIR, et al.,
Appellants.

No. 73-1408

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

IZAAK WALTON LEAGUE OF AMERICA,
Appellee,

vs.

ROBERT L. HERBST, Commissioner of Conservation of the State of Minnesota,
Appellant.

No. 73-1409

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

EARL L. BUTZ, et al.,
Appellants,

vs.

IZAAK WALTON LEAGUE OF AMERICA,
Appellee.

Submitted: February 14, 1974

Filed: May 17, 1974

Before GIBSON, STEPHENSON, and WEBSTER, Circuit Judges.

GIBSON, Circuit Judge.

The Izaak Walton League of America (hereafter the League) brought this action for declaratory judgment to determine the extent of the mineral rights possessed by George W. St. Clair and his successors in interest[1] and the validity of his attempted exercise of those rights within the Boundary Waters Canoe Area (BWCA).

The BWCA, consisting of some one million acres, is a part of Superior National Forest, and is included in the National Wilderness System pursuant to the National Wilderness System Preservation Act of 1964.[2] The League contends that the Wilderness Act precludes any exercise of St. Clair's mineral rights in land within the boundaries of the BWCA. Also named as defendants were the Secretary of Agriculture, the Chief of the United States Forest Service, and the Supervisor of the Superior National Forest, who are responsible for the management of the BWCA, and the Minnesota Conservation Commissioner and Commissioner of Taxation who have various types of jurisdiction over state lands within the BWCA. The State of Minnesota is a nominal defendant since by cross-claim it supports the League's claim against the other defendants in all but one respect.[3]

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[1]George W. St. Clair is now deceased and his successors in interest are named in the suit. Reference to St. Clair in the opinion includes his successors in interest.

[2]16 U.S.C. §1131 *et seq.*, popularly known as the Wilderness Act.

[3]While the League contends that mining activities are totally barred within the BWCA, the State contends that there may be mining activity in the event of a national emergency.

The League also requested injunctions against the federal and state defendants to forbid them granting St. Clair any permits to explore for, drill for, or remove minerals from the BWCA. The District Court[4] held that mining activities were incompatible with the wilderness character of the BWCA. It therefore enjoined St. Clair from any exercise of his mineral rights, and enjoined the federal and state defendants from permitting any exercise by St. Clair of his rights in the BWCA. St. Clair and the federal defendants appeal this decision of the District Court.

In addition, the State of Minnesota appeals the District Court's refusal to allow an amendment to its cross-claim against St. Clair. It attempted to show that the lands in which St. Clair claims mineral rights were fraudulently patented under the federal homesteading laws then in effect, and therefore that title to these lands remains in the United States. The District Court denied leave to amend,[5] holding that the statute of limitations[6] bars such an action, and further, that the State lacks standing to assert this claim.

This litigation, in the defendant St. Clair's words, is "born of frustration." Although Congress has been repeatedly memorialized to appropriate funds to purchase the private mineral rights (this was one of the recommendations of the Selke Committee on Review of the BWCA in 1963 to then Secretary of Agriculture Freeman), Congress has not done so. With the growing demand for minerals

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[4]The Honorable Philip Neville, now deceased, United States District Judge for the District of Minnesota. His opinion is reported at 353 F.Supp. 698 (D.Minn. 1973).

[5]*Izaak Walton League v. St. Clair*, 55 F.R.D. 139 (D.Minn. 1972).

[6]43 U.S.C. §1166, which provides:

> Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents.

and the inability to sell their rights to the Government, the mineral rights owners feel they have no choice but to attempt to exercise them. It is clear from the record that the Forest Service has been expecting such an attempt for several years before the present actions of St. Clair.

Within the BWCA, the surface land area is owned in roughly the following percentages: United States, 71.3%; Minnesota, 26.3%; Minnesota counties, 1.4%; and private parties, 1%. This latter figure is steadily declining as more and more land passes from private to federal ownership. The ownership of the underlying mineral rights is in quite different proportions. The United States owns only 44%; the State and counties, the same 26.3% and 1.4% respectively; while the rights held by private owners amount to 28.3% of the total area. The Forest Service says that the subsurface private ownership of mineral rights in the BWCA represents a serious problem for the management of the BWCA and recognizes that "[a]ny mineral exploration or extraction would jeopardize the surface resources and wilderness character of the area."[7]

St. Clair, through various lease agreements, accumulated the mineral rights in approximately 150,000 acres of BWCA land, and in 1969 had crews enter the BWCA for preliminary exploratory work. With the permission of the Forest Service, his crew established a base camp, and traveling by canoe undertook surface mineral exploration.[8] Apparently encouraged by the preliminary findings,

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[7]Draft Boundary Waters Canoe Area Management Plan at 20. The Draft also proposes to "[p]rohibit insofar as legally possible all commercial mining exploration and extraction." *Id.* at 21.

[8]The defendants characterize the activity as "prospecting" while the League says they were engaged in "mining activity." Whatever the connotation of these terms, from the record it appears that no harm to the wilderness character of the BWCA ensued from these activities. Although the crews did carry prohibited mechanical equipment into the BWCA, this was done without the knowledge or consent of the Forest Service.

St. Clair notified the Forest Service in December, 1969, of his intention to send a drill and crew into the BWCA in late December or early January, 1970, to drill four or five test holes.

The Forest Service, in response, notified St. Clair that before any permit could be issued he would have to furnish the documents establishing his claimed rights, and that the Forest Service would be looking for any possible way to keep him from carrying out his planned activities in the BWCA. This lawsuit was commenced before St. Clair furnished the requested documentation; the Forest Service still has not received the necessary documents; and no administrative determination has been made as to whether a permit should be granted. There have been no additional exploratory activities during the pendency of this lawsuit.

St. Clair contends that: (1) federal laws provide specifically for the exercise of mineral rights within the BWCA; (2) the injunction against St. Clair and the federal defendants was improper and further that it lacks necessary specificity; and (3) the decision of the District Court constitutes a constructive taking of his property requiring the Court to determine reasonable compensation.

The federal defendants argue that: (1) the doctrine of primary jurisdiction should have been applied, as judicial intervention might be unnecessary if the Forest Service is allowed to rule on the permit application; (2) the Wilderness Act makes specific provision for mining activities compatible with wilderness; and (3) the District Court erred when it found, without a hearing, that "prospecting" is incompatible with wilderness.

The League urges affirmance. It asserts that: (1) the Wilderness Act and other federal and state laws prohibit

exploratory mining operations; (2) the federal government has effectively zoned the BWCA to prohibit mining operations; (3) injunctive relief was properly granted; and (4) the doctrine of primary jurisdiction in no way precludes judicial review, especially where the Forest Service has violated its own regulations in allowing St. Clair to use prohibited equipment within the BWCA.

The State of Minnesota seeks reversal of the refusal to allow amendment of its cross-claim, asserting that (1) it has standing, and (2) its claims are not barred by the statute of limitations. It can thus readily be seen that there is no shortage of issues raised on appeal; all save the dispositive issue, primary jusidiction, have been exhaustively briefed and argued. We have, however, determined that the doctrine of primary jurisdiction should have been applied by the District Court and that the question of whether a permit should be issued for exploratory mining operations should first be determined by the Forest Service.

The Government argues that judicial review in this case is precluded by the doctrine of primary jurisdiction. While we believe the facts of this case require our determination that primary jurisdiction should be exercised by the Forest Service, we cannot accept the Government's view that judicial review is precluded. Such a contention confuses the doctrine of primary jurisdiction with that of the exhaustion of administrative remedies, which, although similar in some respects, exists for different reasons.[9] *See* 3 K. Davis, *Ad-*

[9]The Government cites five cases to support its argument that primary jurisdiction precludes judicial review. All but one deal with exhaustion. *Dow Chemical Co. v. Ruckelhaus*, 477 F.2d 1317 (8th Cir. 1973) "exhaustion"; *Bankers v. Village of N. Palm Beach*, 469 F.2d 994 (5th Cir. 1972), *cert. denied*, 411 U.S. 916 (1973) "ripeness"; *United States v. Consolidated Mines & Smelting*, 455 F.2d 432 (9th Cir. 1971) "exhaustion"; *Sterling Drug, Inc. v. F.T.C.*, 450 F.2d 698 (D.C. Cir. 1971) "exhaustion"; *Lockart v. United States*, 420 F.2d 1143 (9th Cir. 1970) "exhaustion".

ministrative Law Treatise, §19.01 (1958) (hereinafter cited as Davis]. The Supreme Court has distinguished the two doctrines in this manner:

> "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pac. R. Co., 352 U.S. 59, 63-64 (1956).

In our present case, the League's claim regarding the construction of the Wilderness Act and other federal and state regulatory statutes is a legal issue, properly cognizable in the courts. Yet the factual questions regarding the effect of mining activity upon the wilderness, and whether a permit should issue with restrictions that would be adequate to protect the wilderness quality of the BWCA are those types of questions peculiarly within the competence of the Forest Service, and statutorily delegated to it by the Wilderness Act. Section 1133(d) provides in part:

> (5) Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, * * * shall be in accordance with regulations established by the Secretary

> of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages * * *.

The Secretary, pursuant to this authority, promulgated 36 C.F.R. §251.85 (1971) governing the BWCA. Section 251.85(e) provides in pertinent part:

> To the extent not limited by the Wilderness Act, the Chief, Forest Service, may prescribe measures * * * necessary to protect and administer the Area; * * * and may require permits for, or otherwise limit or regulate, and [sic] use of National Forest Land * * *.

A permit to mechanically prospect within the BWCA is required by §441.13 of the BWCA Management Handbook, and 36 C.F.R. §251.15 (1971) requires any holder of reserved mineral rights in federal land to apply for and receive a permit before any mining activities may be carried out. Therefore, St. Clair had no right to mine or mechanically prospect for minerals within the BWCA until he had completed application for a permit and the Forest Service had determined whether a permit should issue. In making this determination we must presume that the Forest Service would determine whether or not the planned mining activities were compatible with the wilderness character of the area, and it is this determination upon which a court should give the Forest Service the opportunity to make a record. As Davis, *supra* § 19.01 at 6 states:

> [T]he choice that lies behind the doctrine is between judicial action taken without the benefit of what the agency has to offer to the particular problem, and judicial action that fully takes into account the administrative position on the particular problem.

Rather than taking "judicial notice" that St. Clair's planned activities were incompatible with the wilderness quality of the BWCA, without a hearing and without the benefit of a Forest Service record on the question, the District Court should have stayed the proceedings until after Forest Service action on the permit application, or dismissed the case without prejudice to any suit commenced after final Forest Service action. Although the League's legal claims cannot be decided by the Forest Service, recourse to the courts will be available after final Forest Service action. Allowing the Forest Service to initially determine whether any mining activity will be allowed, consistent with maintaining the wilderness character of the BWCA, would provide the necessary factual record for the District Court's determination of the legal issues presented.

As the necessary documents in support of a permit application have not been filed with the Forest Service, and there is no indication as to when or whether the permit application will be pursued, the cause will be remanded to the District Court with instructions that the Forest Service be allowed to determine upon proper application whether a permit should be issued. The District Court shall, in its discretion, determine whether the present suit should be stayed pending completion of Forest Service action, or whether the suit should be dismissed without prejudice to the institution of any later suit.

Having determined that the judgment of the District

Court must be reversed and the case remanded, we express no opinion as to the correctness of the District Court's decision on the other issues raised by St. Clair, the League, and the federal defendants.

Further, we think the posture of the case at the time of the State's motion to amend requires our approval of the District Court's refusal to allow amendment. The State has made no clear showing of an abuse of discretion in refusing to allow amendment. We, of course, recognize that Rule 15, Fed. R. Civ. P. requires that leave to amend be freely given. *Foman v. Davis*, 371 U.S. 178, 182 (1962); 3 Moore's Federal Practice ¶15.02, ¶16.08 (2nd ed. 1974) [hereinafter cited as Moore]. The allowance of leave, however, lies within the discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971), and is reviewable only for an abuse of discretion. *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821, 823 (8th Cir. 1959); Moore, *supra* ¶15.08[4].

The original cross-claim by the State was filed March 9, 1970. The case was progressing towards trial upon the League and supported by the Wilderness Act and zoning theories advanced by the State. The State did not file its motion to amend until August 19, 1971, some 17 months after its original pleading. This claim of the State injected new issues; and the attempt to prove fraud for each of the parcels of land held by St. Clair would have required extensive preparation and consumed voluminous amounts of trial time to the detriment of a speedy resolution of the case. The refusal to allow amendment is affirmed.

However, we do not decide whether the State has standing or the fraud claim is barred by the statute of limitations; resolution of these issues should await their presentation in an appropriate action. We do note that although

43 U.S.C. §1166 does bar an action to *annul* patents, it has been found not to bar actions to impose a constructive trust upon lands fraudulently obtained, *United States v. Carbon County Land Co.*, 46 F.2d 980 (10th Cir. 1931), *aff'd sub nom. Utah v. United States*, 284 U.S. 534 (1932); *United States v. Carbon County Land Co.*, 9 F.2d 517, 519 (8th Cir. 1925), *aff'd sub nom. Independent Coal & Coke Co. v. United States*, 274 U.S. 640 (1927); *Milner v. United States*, 228 F. 431 (8th Cir. 1915), *appeal dismissed*, 248 U.S. 594 (1918), or to recover the value of the lands fraudulently obtained, *United States v. Whited & Wheless*, 246 U.S. 552 (1918).

The cause is reversed and remanded with directions that the Forest Service be allowed to determine, upon proper application, whether a permit should be granted; and, of course, St. Clair is not at liberty to explore or prospect without a permit from the Forest Service. The District Court may, in its discretion, stay proceedings in the present suit or dismiss without prejudice to any later action. Each party shall bear its or his own costs on appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

IZAAK WALTON LEAGUE OF AMERICA, a not for profit corporation, Plaintiff,

vs.

GEORGE W. ST. CLAIR, THOMAS YAWKEY, CLIFFORD HARDIN, Individually and as Secretary of Agriculture, EDWARD P. CLIFF, Individually and as Chief of the United States Forest Service; CRAIG RUPP, Individually and as Supervisor of the Superior National Forest; JARLE LEIRFALLOM, Commissioner of Conservation of the State of Minnesota; RUFUS T. LOGAN, Commissioner of Taxation of the State of Minnesota, Defendants,

and

ROBERT E. GARDNER, EVELYN A. GARDNER, WILLIAM A. GARDNER, MAREA B. GARDNER, JANE G. HEAD, MURDOCK HEAD, MICHIGAUMI IRON COMPANY and MUSKEGON BANK AND TRUST COMPANY, Additional Defendants.

ORDER FOR PERMANENT INJUNCTION

5-69 Civ. 70

The above case has been before this court on a number of occasions and last on September 15, 1972 at Duluth, Minnesota for final arguments on certain severed issues.

Popham, Haik, Schnobrich, Kaufman & Doty, Minneapolis, Minnesota, by Raymond A. Haik, Esq., appeared for the plaintiff; Robert G. Renner, United States Attorney, by Arthur D. Smith, Esq., Department of Justice, Washington, D.C., appeared for defendants Hardin, Cliff and Rupp; Warren Spannaus, Attorney General, State of Minnesota, by Philip J. Olfelt, Esq., Special Assistant Attorney General, appeared for defendants Leirfallom and Logan; Sullivan, Hanft, Hastings, Fride & O'Brien, Duluth, Minnesota, by William P. O'Brien and Gaylord Swelbar, Esqs., appeared for defendants St. Clair, Robert E. Gardner, Evelyn A. Gardner, William A. Gardner, Marea B. Gardner, Jane G. Head, Murdock Head, Michigaumi Iron Co. and Muskegon Bank and Trust Co.

The court has heard the arguments of counsel, has examined the exhaustive and well prepared briefs and authorities cited therein submitted by all parties, and based thereon and on all of the files, records and proceedings herein and for the reasons set forth in the attached memorandum which is made a part of this order and shall serve in lieu of formal findings of fact and conclusions of law as permitted by Rule 52 of the Federal Rules of Civil Procedure,

IT IS ORDERED That defendant George W. St. Clair as lessee and Robert E. Gardner, Evelyn A. Gardner, William A. Gardner, Marea B. Gardner, Jane G. Head, Murdock Head, Michigaumi Iron Company and Muskegon Bank and Trust Company as lessors, their agents, successors or assigns, be and they hereby are permanently enjoined and prohibited from attempting directly or indirectly mineral exploration or in any other way the exercise of mineral rights in or under land situate within the area known as the Boundary Waters Canoe Area in Minnesota.

IT IS FURTHER ORDERED that defendants Clifford Hardin, Individually and as Secretary of Agriculture, Edward P. Cliff, Individually and as Chief of the United States Forest Service; Craig Rupp, Individually and as Supervisor of the Superior National Forest; their agents, successors or assigns, and defendants Jarle Leirfallom, Commissioner of Conservation of the State of Minnesota; Rufus T. Logan, Commissioner of Taxation of the State of Minnesota; their agents, successors or assigns, be and they hereby are enjoined and prohibited from permitting, directly or indirectly, defendants George W. St. Clair, Robert E. Gardner, Evelyn A. Gardner, William A. Gardner, Marea B. Gardner, Jane G. Head, Murdock Head, Michigaumi Iron Company and Muskegon Bank and Trust Company, from attempting directly or indirectly mineral exploration or in any other way the exercise of mineral rights in or under land situate within the area known as the Boundary Waters Canoe Area in Minnesota.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: January 4, 1973.

/s/ PHILIP NEVILLE
United States District Judge

(Title of Cause.)

MEMORANDUM OPINION

5-69 Civ. 70

NEVILLE, District Judge.

This declaratory judgment action is brought by the Izaak Walton League of America, a non-profit organization formed in 1922, which interests itself *inter alia* in the field of conservation and the use of land areas in the United States. One area in which it has been extremely active is the Boundary Waters Canoe Area (BWCA) in Northern Minnesota extending many miles along the Canadian border and embodying a great many lakes and streams, containing 1,031,204 acres approximately, and a part of the larger area known as the Superior National Forest. It alleges that it long has supported the Federal and State governments in securing legislation protecting wilderness areas generally and that in connection with the BWCA it further went to the extent of purchasing some 7,000 acres, later selling or transferring the same to the United States at something less than its purchase price.

Defendants are (1) George W. St. Clair,[1] who claims to be the lessee of mineral rights underlying approximately 150,000 acres of land in the BWCA, (2) the so-called "Federal defendants" i.e., the United States Secretary of Agriculture, the Chief of the United States Forest Service and the Supervisor of the Superior National Forest, the three of whom regulate and manage the national forests and the BWCA, (3) the so-called "State defendants", i.e., the State of Minnesota Conservation Commissioner and the

[1]Thomas Yawkey originally was named as a defendant but on agreement of counsel the case was dismissed as to him by order dated April 19, 1971 subject to certain conditions since his counsel stated he no longer owns or leases any mineral interests in the BWCA and that in any event he agreed to be bound by the outcome of this litigation should it later develop he does own some such interest.

Commissioner of Taxation, both of whom in different ways have jurisdiction over State lands, and (4) a number of other defendants who are lessors to St. Clair as owners of the mineral rights, later joined by the court by order dated April 19, 1971.

The BWCA is an irregularly shaped area extending 110 miles more or less from east to west hugging the Canadian border and at places measuring 30 miles or more from north to south. Included within it are hundreds of lakes and streams through which one in a canoe, with numerous portages, can pass virtually from one end to the other in an east-west direction said to be the "Highway of the Voyageurs" of the 18th Century. It complements and abuts the Quetico Superior Park on the Canadian side of the border, subject to certain international agreements and treaties including the Webster-Ashburton Treaty of 1842. With the exception of logging largely years ago and certain scarring by forest fires, the area remains substantially in a natural state with large stands of virgin timber. All former private resorts in the area have now been or are being removed and closed and travel in the area by airplane, motor boat or any motorized vehicle is strictly prohibited. It is a roadless area and the establishment of camps is rigidly regulated. Other regulatory means exercised both by the State and Federal governments are employed to keep the area in its pristine condition. From 100,000 to 150,000 people a year including Boy Scout troops and others from all over the United States are said to enter the area and canoe, tramp or camp therein.

From a stipulation of facts filed by counsel it appears that approximately 71.3% or 742,800 acres within the BWCA are owned by the United States, 26.3% including lake beds by the State of Minnesota, 1.4% by counties

and approximately 1% privately, though gradually by condemnation expiration of life estates and otherwise this 1% is decreasing. On the other hand of the underlying mineral rights, the United States owns only 44% or 458,-224 acres, the State of Minnesota and counties the same 26.3% and 1.4% with the remaining 28.3% of the mineral rights, including the St. Clair claims, held in private ownership.

The case here arises because during 1969 defendant St. Clair, through various employees and agents, entered BWCA with the Federal defendants' permission and undertook surface mineral exploration, establishing a base camp and other more temporary encampments. Travel was by canoe. In December, 1969, St. Clair gave notice that core drilling was planned, which would involve the use of mechanical equipment, access overland and permanent camps. The Federal officials in charge besides permitting the original entry authorized the establishment of the original base camp for a period longer than normally permitted by applicable regulations. Exploratory mining operations generally are not uses contemplated or permitted by the BWCA regulations (the substantial argument being whether they are so prohibited). As to the core drilling request, the Federal defendants on receipt of it requested information concerning St. Clair's right and title to the tracts of land on which he intended to drill. Prior to being furnished such, the present lawsuit was commenced. No action has been taken on the application by either the Federal defendants nor has any administrative determination been made.

After the commencement of this lawsuit, St. Clair's exploration activities ceased at the request of or on order from the Forest Service. The equipment used by St. Clair

originally was stored at the base camp site he had established. The original reservation and severance of the mineral rights St. Clair now seeks to exercise were effected approximately 38 years ago, principally in the year 1934, with some in 1929, one tract in 1935, and the last in 1936. St. Clair, however, did not acquire his rights as a lessee until quite recently in 1969 for the most part. Plaintiff proceeds on various legal theories and prays a judgment in short declaring St. Clair and his agents to have no authority or right to enter BWCA for the purpose of exploring, drilling for or removing minerals and enjoining both the Federal and State defendants from permitting such.

PROCEDURAL HISTORY OF CASE

A motion for preliminary injunction became moot when it was reported to the court that St. Clair's equipment had been stored and that no further entry would be made or exploration activity conducted pending the determination of this declaratory judgment action. This court, by order dated June 1, 1970, *Izaak Walton League of America v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970), denied the motion of the Federal defendants to dismiss on the grounds that the complaint fails to state a cause of action, that the United States had not consented to suit against it and that plaintiff lacks standing. Subsequently the Federal defendants filed an answer requesting dismissal and taking the view that what they permitted as to St. Clair or might so do in the future either as to him or others is properly an administrative matter and not within the purview of the court's jurisdiction in an action such as this. Meantime, the State defendants answered, stating in part "Defendant Commissioner of Conservation agrees generally

with the nature of the claim . . . subject however to specific denials, affirmations and additional allegations . . .", but contending that the land in the BWCA should be subject to mining activity only as "related to a national emergency". The State defendants have cross-claimed against the Federal defendants in support of the plaintiff's request for permanent injunction. Defendant St. Clair has answered in general denying the allegations of the complaint and the cross-complaint as have his lessors who were joined as additional defendants by order of this court of April 19, 1971, which order also denied various dismissal motions. Subsequently the State defendants moved to amend their answer and cross-claim to assert that the lands in which St. Clair claims mineral rights were, prior to the year 1900, separated fraudulently from the public domain under the then applicable federal homesteading law and therefore no private titles thereto can or do exist and title remains in the United States. Exhibits and briefs presented would indicate some substance to the claim, had it been timely presented years ago. The court denied leave so to amend, however, on May 15, 1972 *Izaak Walton League v. St. Clair*, 55 F.R.D. 139 (D. Minn. 1972), holding as a matter of law that even if established, such facts at this late date would not constitute a defense in view of the statute of limitations. Subsequently at the court's instance, argument was held for a full day at Duluth, Minnesota on September 15, 1972. The legal questions are now ripe for decision.

CONGRESSIONAL HISTORY

The statutory and administrative history behind the BWCA is rather lengthy. March 3, 1891 Congress directed that "The President of the United States may, from time

to time, set apart and reserve in any state . . . having public land bearing forests . . . any part of the public lands . . . as national forests . . . by public proclamation." 16 U.S.C. § 471. By Congressional Act of June 4, 1897, 16 U.S.C. § 473 *et seq.*, detailed provisions were made for administration and regulation of national forests, including sale and use of timber, egress or ingress of actual settlers and tourists and other matters. Jurisdiction as of today is in the hands of the United States Forest Service, a division of the Department of Agriculture, and thus subject to regulations prescribed by the Secretary of Agriculture. This Act provided, however, 16 U.S.C. § 478:

> "Nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof."

Also, 16 U.S.C. § 482 contains the following language:

> ". . . And any mineral lands in any national forest which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions contained in sections 473-482 and 551 of this title."

Though in 1893 lands in Minnesota were withdrawn from the general mining laws[2] authorizing location and patenting of minerals in public domain lands, it is quite clear that Congress in early legislation did not intend to

[2]30 U.S.C. § 48 made inapplicable 30 U.S.C. § 22 which latter permitted a prospector who filed a claim to follow, within limits, the vein or lode in accordance with the customs and laws in force at the date of the location.

remove national forest land from mineral exploration. 16 U.S.C. § 475 speaking of National forests contains the provision:

> ". . . but it is not the purpose or intent of these provisions . . . to authorize the inclusion therein [national forests] of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes."

As late as 1950, 16 U.S.C. § 508b, Congress passed an Act providing as to previously withdrawn land for the prospecting and for the development and utilization of such mineral resources.

In 1909 by proclamation President Theodore Roosevelt established the Superior National Forest, an area of approximately 3,000,000 acres. Included within it is what is now the 1,031,204 acres of the BWCA. The President thus at that time, though given the statutory right to revoke his proclamation in whole or in part, 16 U.S.C. § 473, made a finding at least inferentially that the Superior National Forest was more valuable for forest than for mineral. To date no President nor Congress has ever sought to reverse this position nor to proclaim otherwise.

In or prior to 1927 the Secretary of Agriculture, pursuant to authority vested in him by the Act of June 4, 1897, see 16 U.S.C. § 551, established the first roadless area in the Superior National Forest. See *United States v. Perko*, 108 F. Supp. 315, 316 (D. Minn. 1952), *aff'd Perko v. United States*, 204 F.2d 446 (8th Cir. 1953), *cert. denied* 346 U.S. 832 (1953). Thereafter other roadless areas were established which, when all combined became by regulation promulgated January 27, 1958 the BWCA

and was so renamed.[3] Meantime, a Presidential Proclamation banning airplane flights below 4.000 feet over the roadless area of the Superior National Forest was held valid by judges of this court against a challenge of unconstitutionality. *United States v. Perko, supra.* See companion cases of *United States v. Perko,* 133 F. Supp. 564 (D. Minn. 1955), 141 F. Supp. 372 (D. Minn. 1956); *Bydlon v. United States,* 175 F. Supp. 891 (Ct. Cl. 1959).

In 1930 Congress passed what came to be known as the Shipstead-Newton Nolan Act, 16 U.S.C. § 577 *et seq.,* withdrawing from public entry or appropriation under land laws of United States the public lands in the Superior National Forest.[4] By the Thy-Blatnik Act of June 1948, as later amended, the Secretary of Agriculture was given authority to purchase land from private individuals, subject however to 16 U.S.C. § 513 *et seq.,* the Weeks Act of 1911, which required originally that any reservation of rights, where a deed was given to the United States must spell out the time within which minerals shall be removed and rules and regulations under which such could be done. As amended in 1913 this section provides:

> "Such . . . reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture . . . and such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States. . . ."
> 16 U.S.C. § 518

[3]The Superior Roadless Area was established in 1939 and in 1948 the Little Indian Sioux and the Caribou Roadless Areas were announced.

[4]This statute recites as a purpose "conserving the National beauty of shore lines for recreational use". It also limited logging privileges and actions affecting water levels. 16 U.S.C. §577a.

There are thus two categories or types of reservations: those reserved by grantors in deeds to the United States and those already existing in third parties at the time the United States acquired the surface rights. In the former, the United States may prescribe conditions and incorporate its regulations.

The most recent Congressional Act is the so-called National Wilderness Act of 1964, 16 U.S.C. § 1131 *et seq.* By 16 U.S.C. § 1133(d)(5) the BWCA was expressly statutorily recognized as a distinct area:

> "Other provisions of this chapter to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams and portages."

This section makes no reference to minerals, but two sections of the same Act 16 U.S.C. § 1133(d)(2) and (3) provide as follows:

> "(2) Nothing in this chapter shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, *if such activity is carried on in a manner compatible with the preservation of the wilderness environment.* Furthermore, in accordance with such program as the

Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress." [Emphasis added]

"(3) Notwithstanding any other provisions of this chapter, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to September 3, 1964 [5] extend to those national forest lands designated by this chapter as 'wilderness areas'; *subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production,* and use of land for transmission lines, water-lines, telephone lines, or facilities necessary in exploring, drilling, producing, mining, and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the boundaries of said wilderness areas shall be held and used solely

[5]As pointed out in footnote 2 *supra*, the United States mining laws were not applicable prior to September 3, 1964 to Minnesota lands. Thus this section by its very wording has no application to the BWCA.

for mining or processing operations and uses reasonably incident thereto". [Emphasis added]

The Act further provides: 16 U.S.C. § 1133(c)

"Except as specifically provided for in this chapter, and *subject to existing private rights*, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."

REGULATIONS OF THE SECRETARY OF AGRICULTURE

Some fifteen months after the passage of the Wilderness Act and on December 21, 1965, the Secretary of Agriculture adopted 36 C.F.R. § 251.85 titled "Special provisions governing the BWCA, Superior National Forest". In material part, these read as follows:

"Subject to existing private rights, the lands now owned or hereafter acquired by the United States within the Boundary Waters Canoe Area of the Superior National Forest, Minn., as formerly designated under Reg. U-3 (§ 251.22) and incorporated into the National Wilderness Preservation System under the Wilderness Act of September 3, 1964, shall be ad-

ministered in accordance with this regulation for the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, *the primitive character of the Area, particularly in the vicinity of lakes, streams, and portages.*

. . .

(b) Except as provided in the Wilderness Act, in this section and in §§ 251.27, 251.28, and 251.30, and *subject to existing private rights,* there shall be no commercial enterprises and no permanent roads within the Boundary Waters Canoe Area and there shall be no temporary roads, no use of motor vehicles, motorized equipment, or motorboats, no landing of aircraft, and no other form of mechanical transport.

(1) All uses that require the erection of permanent structures and all permanent structures except as herein provided, are prohibited in the Boundary Waters Canoe Area. The Chief, Forest Service, may permit temporary structures and commercial services within the Boundary Waters Canoe Area to the extent necessary for realizing the recreational or other wilderness purposes, which may include the public services generally offered by outfitters and guides.

. . .

(3) The overland transportation of any watercraft by mechanical means, including the use of wheels, rollers, or other devices, is prohibited. . . .

(4) No motor or other mechanical device capable of propelling a watercraft through water shall be transported by any means across National Forest

land except over routes designated by the Chief, Forest Service. . . .

. . .

(c) No permanent or semipermanent camp may be erected or used on National Forest land except as authorized in connection with a reserved right, or in the Portal Zone in connection with the harvest and removal of timber and other forest products.

. . .

(f) Nothing in this regulation shall be construed as affecting the jurisdiction or responsibility of the State of Minnesota with respect to wildlife and fish in the National Forest.

(g) The State of Minnesota, other persons, and their successors in interest owning land completely surrounded by National Forest land shall be given such rights as may be necessary to assure adequate access to that land. Such rights may be recognized in stipulations entered into between the Forest Service and the private owner or State. Such stipulations may prescribe the means and the routes of travel to and from the privately owned or State land which constitute adequate access *and any other conditions reasonably necessary for the preservation of the primitive conditions within the Boundary Waters Canoe Area.*"

December 1964 the BWCA Review Committee appointed by the then Secretary of Agriculture submitted a ten-page report containing *inter alia* a recommendation:

"18. It is recommended that all pending applications for mineral prospecting permits pertaining to the

BWCA be reviewed and that action be taken to withdraw consent where previously given. It is recommended that the Secretary of Agriculture withhold consent on all present and future applications.

The Committee supports the 1954 statement by former Forest Service Chief McArdle that mining not be allowed in the BWCA except in a national need and emergency. Full mineral development should be continued on the portion of the Superior National Forest outside the BWCA."

In response to this report the Secretary of Agriculture issued a statement January 12, 1965 reading in part as follows:

"IV. *Mining Activities*

The Committee recommends, in summary, that consent of the Department of Agriculture not be given for mining and mineral leasing in the Boundary Waters Canoe Area, except in a national emergency, and that private mineral rights within the Canoe Area should be acquired.

. . .

We will follow the policy of withholding consent on future applications for mineral prospecting permits in the Canoe Area except in cases of national emergency. As recommended by the Committee, we will withdraw consent previously given where we can. I accept the view that mineral development should proceed outside of the Canoe Area."

STATE OF MINNESOTA LAWS AND POLICY

Minn. Stat. § 92.45 (1923) recognizes in general the federal jurisdiction over the BWCA and the restrictions imposed by 16 U.S.C. § 577-577b. Minn. Stat. § 1.045 gives the State's consent to acquisition by the Federal Government of land in the Superior National Forest. In general the State has enacted legislation complementary to the Federal legislation. Minn. Stat. §§ 84.43, 84.44, 14.16, 84.521. The State Department of Conservation has pursued substantially the same policies as the Federal Department of Agriculture, and the State's regulations for purpose of this case are substantially in accord. No State permits nor leases have been given for mineral exploration of any land owned by the State of Minnesota in the BWCA. Minnesota passed the "Little Shipstead Nolan Act" of 1933 Minn. Stat. § 110.13 and in 1947 by Joint Resolution importuned Congress to enact laws to preserve the Wilderness Area. The "Little Wilderness" Act Minn. Stat. § 84.43-84.52 limited air and motorboat traffic in the area. The State's administrative activities have been diligent for many years in an effort to preserve the Wilderness character of BWCA, including participation in international conferences with Canada, prosecutions for trespass and of an offending pilot, opposition to the building of proposed roads, the prohibition of bringing cans and bottles within the BWCA, regulations relating to game and fish, and other similar actions. The State's pronouncement of its public policy is very clear as to BWCA, reference being made to its "matchless scenic beauty of inestimable value from the recreational and tourist viewpoint". The State of Minnesota obviously is as anxious to preserve the BWCA as is the Congress judging from the State's past activities and indeed from the answer and

cross-claim of its officers in this suit. Its position differs from that of the Izaak Walton League only in that the latter desires a complete prohibition of all mining activities whereas the State would except from the injunction activities "related to a national emergency".

The State's position dates back really to 1902 when its Chief Fire Warden recommended lands be set aside for what later in 1909 became the Superior National Forest. Substantial State effort was made during the 1920's and thereafter in opposing an hydroelectric project proposed for the area, and later in opposing the so-called "Gun Lake" road. The State cites all of the above as evidence of an adopted statutory and administrative policy to which the court should give weight in its determination.

PARTIES' CONTENTIONS

The questions before the court for decision are several. Plaintiff and the State defendants on their cross-claim contend the BWCA has been effectively zoned against any kind or sort of commercial activity including mining and mining exploration under either or both State and Federal statutes and regulations and that in any event defendant St. Clair and his lessors have abandoned any claims they might have had to mineral rights and/or are guilty of laches or are estopped.

Defendant St. Clair asserts two basic contentions. First that Congress did not intend to ban the exercise of mineral rights in Wilderness areas including BWCA and second, even if it had so intended, attempting so to do would constitute a deprivation of defendants' property without due process of law. The Federal defendants in general join defendant St. Clair's position but more directly continue to stand on the proposition that this declaratory judgment

suit is premature since administratively the Forestry Service never has passed on St. Clair's application for core drilling in the BWCA. These defendants join St. Clair and the others in asking for a dismissal of the action.

ZONING

This court is satisfied, if it can be said that Congress intended to bar all mineral activities in the BWCA, that it has the power and prerogative so to do. The wilderness purpose is a public one and the prescription and regulations are in this court's opinion reasonable. Rarely does zoning take place without someone suffering some impairment of the unbridled right of use of property and often perhaps some depreciation in value.

It is well established that governmental bodies do have the right to zone property against certain uses, even though to some extent such deprives the owner of some of the purposes to which he could devote his property. The most common example is in cities where certain areas are zoned commercial, others industrial and still others residential with a variety of intermediate classifications. Argument is made that zoning is the exercise of a police power; that police power is limited to the states since the Federal government has no inherent police power; that the zoning cases cited by plaintiff are instances of state or municipal regulations and not an attempt by the Federal government to exercise inherent zoning power. While in general this stands as a correct proposition, it would seem not to be applicable here in a situation where the Federal government is controlling and regulating the use of its own land and land of the State of Minnesota where the state in turn has explicitly recognized the Federal government's right so to regulate, con-

trol and thus to zone the property. In the BWCA the State of Minnesota has bowed to the jurisdiction of the Federal government and has in fact cooperated with it. Zoning is appropriate even though it may require abandonment of uses to which the property has previously been devoted. Persuasive here is the case of *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). In the *Hadacheck* case the court upheld a Los Angeles City ordinance prohibiting the operation of brick kilns despite the fact that when defendant purchase his property for the purpose of mining its extensive clay deposits and to operate kilns it was not situate within the City of Los Angeles. Though this resulted in a substantial reduction in valuation of the property the Supreme Court upheld the validity of the zoning ordinance. The most recent case which the court has been able to find in the Eighth Circuit is *City of St. Paul v. Chicago, St. Paul, Mpls. and Omaha Ry.*, 413 F.2d 762 (8th Cir. 1969). In this case the court upheld the zoning ordinance regulating building heights and placing restrictions on erecting structures adjoining a city park in a downtown river front area. The lower court found such depreciated the value of the property from $320,000 to $150,000. What the court there said is very appropos to the case at bar and a more clear iteration of the applicable principles than this court could restate (p. 766):

> ". . . They argue, however, that the ordinance is violative of the Fifth Amendment to the United States Constitution and Article 1, Section 13 of the Minnesota Constitution in that it takes the railroads' property without compensation.
>
> Neither constitutional provision interposes a barrier to the imposition of restrictions on the use of private property if a zoning ordinance is enacted pursu-

ant to a valid exercise of the police power. Goldblatt v. Town of Hempstead, 369 U.S. 590, 593, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962);[8] City of Marysville v. Standard Oil Co., 27 F.2d 478 (8th Cir. 1928), aff'd, Standard Oil Co. v. Marysville, 279 U.S. 582, 49 S.Ct. 430, 73 L.Ed. 856 (1929); Kiges v. City of St. Paul, 240 Minn. 522, 62 N.W.2d 363, 369-370 (1953); State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N.W. 569, 54 A.L.R. 1012 (1925), aff'd mem., 273 U.S. 671, 47 S.Ct. 474, 71 L.Ed. 832 (1927).[9] The test of whether the enactment falls within that power is one of reasonableness.

The zoning ordinance will be sustained unless its '* * * provisions are clearly arbitrary and unreasonable, having no substantial relation to the public

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[8] "* * * The power which states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." '
Goldblatt v. Town of Hempstead, 369 U.S. 590, 593, 82 S.Ct. 987, 989 (1962).

[9] 'The public use, which sustains the taking of property under the power of eminent domain upon compensation paid, differs from the public interest or welfare which justifies the restriction of the individual in the use of his property without compensation, in consideration of the public interest and common welfare of the community. * * *

* * * * *

'Zoning statutes are becoming common. The police power in its nature indefinable, and quickly responsive, in the interest of common welfare, to changing conditions, authorizes various restrictions upon the use of private property as social and economic changes come. A restriction, which years ago would have been intolerable, and would have been thought an unconstitutional restriction of the owner's use of his property, is accepted now without a thought that it invades a private right. As social relations become more complex, restrictions on individual rights become more common.'
State ex rel. Beery v. Houghton, 164 Minn. 146, 204 N.W. 569-570 (1925), aff'd mem., 273 U.S. 671, 47 S.Ct. 474 (1927).

health, safety, morals, or general welfare.' Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926). Gorieb v. Fox, 274 U.S. 603, 608-609, 47 S.Ct. 675, 71 L.Ed. 1228 (1927); McMahon v. City of Dubuque, Iowa, 255 F.2d 154, 158-159 (8th Cir.), cert. denied, 358 U.S. 833, 79 S.Ct. 53, 3 L.Ed.2d 70 (1958); Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206, 212 (1968); State ex rel. Howard v. Village of Roseville, 244 Minn. 343, 70 N.W.2d 404, 407 (1955).

In reviewing the trial court's determination of invalidity, we examine the record not to see whether its findings are supported by evidence but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. South Carolina State H. Dept. v. Barnwell Bros., 303 U.S. 177, 191-192, 58 S.Ct. 510, 82 L.Ed. 734 (1938); Weinberg v. Northern Pac. Ry. Co., 150 F.2d 645, 648 (8th Cir. 1945).

Fairly debatable questions as to the reasonableness, wisdom and propriety of an ordinance are not for the determination of the courts but for that of the legislative body on which rests the duty and responsibility of the decision. Standard Oil Co. v. Marysville, *supra*; Naegele Outdoor Adv. Co. v. Village of Minnetonka, 162 N.W.2d at 209.

The mere fact that the ordinance seriously depreciates the value of the complainants' property is not enough to establish its invalidity. Goldblatt v. Town of Hempstead, *supra* at 594, 82 S.Ct. at 990.[10]

[10]This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which con-

American Wood Products Co. v. City of Minneapolis, 21 F.2d 440, 444 (D. Minn. 1927) (J. Sanborn), aff'd, 35 F.2d 657 (8th Cir. 1929); Kiges v. City of St. Paul, 62 N.W.2d at 369. Nor can it be invalidated on the grounds that aesthetic consideration will be furthered if it is permitted to stand. Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954);[11] Naegele Outdoor Adv. Co. v. Village of Minnetonka, *supra*;[12] State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 174 N.W. 885, 176 N.W. 159, 162, 8 A.L.R. 585 (1920).[13]

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stitutionally requires compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 * * *. There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Mahon, supra, it is by no means conclusive, see Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 * * *, where a diminution of value from $800,000 to $60,000 was upheld. * * *'

Goldblatt v. Town of Hempstead, *supra* at 594, 82 S.Ct. at 990.

[11] '* * * The concept of the public welfare is broad and inclusive. * * * The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.'

Berman v. Parker, 348 U.S. 26, 33, 75 S.Ct. 98, 103 (1954).

[12] '* * * The mere fact that the adoption of a zoning ordinance reflects a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance. Thus, if the challenged restriction is reasonably related to promoting the general welfare of the community or any other legitimate police power objective, the fact that aesthetic considerations were a significant factor in motivating its adoption cannot justify holding it unconstitutional. * * *.' (Citations omitted.)

Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206, 212 (1968).

[13] '* * * It is time that courts recognize the aesthetic as a factor in life. Beauty and fitness enhance values in public and private structures.' State ex rel. Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159, 162 (1920.)" 413 F.2d at 766-68

The Minnesota Supreme Court has consistently upheld reasonable zoning ordinances, *Alexander Co. v. City of Owatonna,* 222 Minn. 312, 24 N.W.2d 244 (1946); *Northwestern Tele. Exchange Co. v. City of Minneapolis,* 81 Minn. 140, 83 N.W. 527 (1900), 86 N.W. 69 (1901); *State ex rel. Beery v. Houghton,* 164 Minn. 146, 204 N.W. 569 (1925). It seems to the court here that if such is what Congress intended, Congress clearly had the power to zone the BWCA in view of the public purpose to keep it virginal and untrammeled. Applying the tests in the *City of St. Paul* case quoted above, it seems patent that the regulation of the BWCA is not clearly arbitrary and unreasonable, that such does have a substantial relation to a public purpose and has a rational basis. The fact that zoning may seriously depreciate the value of property or that aesthetic consideration will be furthered is not a ground for invalidation of zoning. *Naegele Outdoor Adv. Co. v. Village of Minnetonka,* 281 Minn. 492, 162 N.W. 2d 206 (1968). Whether mineral rights owners might be able to claim a "taking" so as to be able to assert a cause of action in the Court of Claims under the Tucker Act 28 U.S.C. § 491 is not a question now before the court.

The power of the Federal government to create and regulate wilderness areas for recreational purposes for the public has been held to exist in other cases. *United States v. Gregg,* 290 F. Supp. 706 (W.D. Wash. 1968) (air regulations); *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965) (motor vehicle regulations); *United States v. Foresyth,* 321 F. Supp. 761 (D. Colo. 1971) (core drilling etc.); see also *West Virginia Highlands Conserv. v. Island Creek Coal Co.,* 441 F.2d 232 (4th Cir. 1971).

ABANDONMENT, LACHES, EQUITIES

One position taken by plaintiff and the State is that the court need not decide the question of the power of the Federal government to zone or whether Congress did in fact so intend. They point out that though the mineral rights have existed in a severed title for some 38 years more or less during all of which time the Superior National Forest was being promoted and developed at the expenditure of more than 12-1/2 million dollars and during which time the 1964 Wilderness Act was passed, no action was taken or attempted to be taken by the owners to exercise their mineral rights until after the BWCA concept was fully matured and the area began to have its most extensive Wilderness appeal for tourists.

Actually St. Clair, according to the stipulation of facts filed herein, acquired his leases for the most part in 1969, with one in 1967, one in 1968 and one in 1970. There is no evidence before the court as to the terms thereof. However, both the severance of the mineral rights as separate titles or estates in 1929 and the recent acquisition of leases by St. Clair occurred after the establishment in 1927 of the first roadless area and as to St. Clair's acquisition, long after the passage of the Wilderness Act of 1964. The direction of the Federal and State governments were taking was by this time clear.[6]

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[6]See *United States v. Perko*, 108 F. Supp. 315, 317 (D. Minn. 1952), where the court stated:

> "This first road ban regulation in the Superior National Forest was promulgated before there was any extended use of aircraft as a means of travel into remote recreational areas, and was prompted no doubt by a policy to preserve the unique character of this national forest which extends along the Canadian border for many, many miles. To the north of a substantial portion of the forest, Canada has established a national park. The general area constitutes one of the last wilderness areas in the United States. From the days of the

From this premise the State and plaintiff argue that defendant St. Clair, and his lessors, are mere speculators hoping to advantage themselves as opportunists. It is true that at no time since the severance from the title of the mineral rights, have either the owners or lessees been required to pay any Minnesota real estate taxes thereon. The Minnesota Supreme Court long has held that mineral rights are an estate of inheritance *Washburn v. Gregory Co.*, 125 Minn. 491, 147 N.W. 706 (1914); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957). A tax against a particular tract was held not to be a lien upon or

voyageurs, it has been a canoe country, and the innumerable lakes and connecting streams with adjacent portages furnish an almost endless variety of trips by water. Perhaps no other place in the United States is so steeped in the lore of the Indian fur trader, who traditionally used these waterways before the Northwest was settled. Public interest in the conservation of this area so that it might be retained in its primitive condition undoubtedly motivated the Secretary of Agriculture in establishing regulations so that the intrusion of automobiles and other vehicles would not destroy the unique recreational appeal of this Forest Reserve. The Roadless Areas have been augmented from time to time and now aggregate approximately one million acres. They are commonly known as Superior, Little Indian Sioux, and Caribou Roadless Areas. . . . [108 F. Supp. at 317]

. . .

. . . The conservation of this wilderness tract is an outgrowth of years of government planning. Drastic curtailment of any exploitation by the use of the water therein for commercial purposes has been attained by congressional enactment. Public lands have been withdrawn from entry, and logging along certain waterways has been definitely restricted in order to 'conserve the natural beauty of shore lines for recreational use.' The Roadless Area was created by the Secretary of Agriculture in order to conserve the uniqueness of this region for the type of public recreation for which it was singularly adapted. That purpose and the general policy of the Government, as manifested in so many ways by congressional action and the legislative history, is now threatened by unrestricted airplane travel to and from that area. One of the effective barriers against the spoilation of the primitiveness of this canoe country was the establishment of the Roadless Area. This barrier, of course, will be circumvented entirely by the use of airplane travel, not only to the comparatively few resorts now located therein, but by airplane travel to and from the many lakes which will be used as landing fields for public and private air travel transportation." [108 F. Supp. at 320]

attach to the minerals therein where separately owned. Minn. Stat. § 93.52 *et seq.* now and since 1969 requires a form of recordation of mineral interests with the Register of Deeds or Registrar of Titles, but heretofore there has been no such requirement.

There is no merit in the bare bones contention that failure to pay any real estate taxes on mineral rights in some way or other forfeits them for reserved mineral rights have never been separately assessed nor subject in Minnesota to real estate taxes. Yet the law and decided cases have permitted deliberate attempts to arrange real estate transactions whereby the grantor and his heirs retained a speculative mineral interest for generations without having to pay taxes or any carrying charges, to the end that if mineral in merchantable quantities ever were discovered, the holder could interfere with the surface rights to realize upon his speculation. Defendant St. Clair and his lessors are in this class. The court does not believe it can find as such an intent for abandonment, nor the existence of laches, without an evidentiary factual hearing, but must recognize in view of the above facts that the equities are not strong in favor of defendant St. Clair and his lessors. Their speculative purpose and obvious knowledge flies directly in the face of what plaintiff and the State and Federal governments are attempting to do to preserve the BWCA and whereas in a technical sense the law of bona fide purchase is not applicable, such equitable considerations are properly considered by the court. The State in particular has advanced a theory of trusteeship claiming that under such cases as *Klass v. Twin City Federal Savings and Loan Ass'n*, 291 Minn. 68, 190 N.W.2d 493 (1971), and *Heywood v. Northern Assurance Co.*, 133 Minn. 360, 188 N.W. 632 (1916), defendants St. Clair

and his lessors have unjustly enriched themselves. The court does not see these cases or this theory as particularly apposite here, which is not to say, however, that any injustice will be done if these defendants are held to be some sort of constructive trustees for the public on the basis of being speculators knowing the trend of the BWCA development history.

ACCESS TO MINERAL RIGHTS

Plaintiff and the State contend that St. Clair and the mineral rights owners can obtain access to their land only by using State controlled waters or by traversing other properties owned either by the Federal government or the State of Minnesota; that there were no grants of easements over other properties giving them access such as might be where a grantor deeds off a portion of his property, retaining the balance which landlocks the granted portion and where courts have implied an easement. Here the adjoining property, over which mineral rights owners would of necessity have to travel was, so far as appears, never owned by common grantors. To gain meaningful access to the property other than by canoe and portage, some overland roadway or railroad right-of-way would have to be established, cutting through the heart of the BWCA, or some exception carved out of the air ban which this court long ago has upheld. See *United States v. Perko supra.* In answer, defendant St. Clair points to 42 U.S.C. § 1139 (a) and (b) and to the Department of Agriculture Regulations 36 C.F.R. §§ 251.81, 251.82 and 251.85(g), the former of which read as follows:

> "251.81 Access to surrounded State and private lands.

States or persons, and their successors in interest, who own land completely surrounded by National Forest Wilderness shall be given such rights as may be necessary to assure adequate access to that land. 'Adequate access' is defined as the combination of routes and modes of travel which will, as determined by the Forest Service, *cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the State and private is held or used. . . .*" [Emphasis added]

"251.82 Access to valid mining claims or valid occupanies.

Persons with valid mining claims or other valid occupancies wholly within National Forest Wilderness shall be permitted access to such surrounded claims or occupanies *by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect* to other such claims or occupancies surrounded by National Forest Wilderness. The Forest Service will, when appropriate, issue permits which shall prescribe the routes of travel to and from the surrounded claims or occupancies, the mode of travel, and other conditions reasonably necessary to preserve the National Forest Wilderness." [Emphasis added]

Attention also is called to Regulation 36 C.F.R. § 251.-83 which is rather extensive but spells out in some detail treatment that should be accorded those who owned mining claims "prior to inclusion of the land within the National Wilderness Preservation System." Plaintiff and the

State answer this by arguing that the regultaions are subject to the statute and the Secretary of Agriculture either overlooked the fact of the special statutory treatment of BWCA or intended these regulations not to apply to it. Whatsoever that rationale, it is factually clear that some means of access either by air, water or over land will of necessity be required and *pro tanto* will destroy the wilderness.

BWCA SPECIALLY TREATED IN STATUTE

Plaintiff's counsel argues that all of the references in the Congressional acts, including the Wilderness Act of 1964 and regulations promulgated thereunder which refer to permissive mineral activities have no application to the BWCA since in the Wilderness Act the BWCA is specifically mentioned, and is the only Wilderness area specifically so mentioned. Since no reference to minerals activity is included in such section, it was not intended by Congress that mineral activity would prevail or be permitted in the BWCA. Counsel arrives at this conclusion in that 16 U.S.C. § 1133 (d)(5) commences "Other provisions of this chapter to the contrary notwithstanding . . ." and goes on to place management of the BWCA under regulations established by the Department of Agriculture ". . . in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area. . . ." It will be observed no mention of mining or mining exploration is mentioned in this section. In attempting to construe the intent of Congress, this argument would seem to have some merit. Further, the sections of the Wilderness Act appearing to authorize mining in National Forests and

Wilderness areas refer to the "United States mining laws and all laws pertaining to mineral leasing" 16 U.S.C. §§ 478 and 482 and 1133(d) (3) refer to mining rights in these same terms. Again, this language would seem of assistance in attempting to construe Congressional intent in view of the fact that United States Mining Laws, i.e., staking or locating a claim, have been prohibited on land in Minnesota since 1873, after which 16 U.S.C. §§ 478, 482 and 1133 were enacted. The use of this language further bolsters the argument that BWCA is a special area and should be treated separately.

Further, an inconsistency would appear to arise in that both the 1964 Wilderness Act and the BWCA Regulations speak in terms of "existing" and "reserved" rights and yet the Wilderness Act specifically reaffirmed the Shipstead Nolan Act, 16 U.S.C. § 577(a) which contains no such exceptions; nor does Executive Order 10092, the air ban order.

The attorney for the Federal defendants refers to the 1969 National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* but that Act is so new and became effective after the filing of this action that this court has not based its decision thereon.

INJUNCTIVE RELIEF

The Federal defendants claim that their administrative process has been thwarted; that the suit is at best premature and that given an opportunity they might or might not issue permits to defendants St. Clair and permit further mineral exploration; that until it is known what they will do, the action is not ripe for decision. The fact is, however, that the administrative regulations including the most

recent Wilderness Act of 1964, contain within themselves fundamental inconsistencies. A Wilderness purpose plain and simply has to be inconsistent with and antagonistic to a purpose to allow any commercial activity such as mining within the BWCA. A look at the maps stipulated in evidence will reveal that the reversed mineral rights in private hands are situate right in the middle of the BWCA. There can be no question but that full mineral development and mining will destroy and negate the wilderness or most of it. Even any substantial exploratory operation such as core drilling will require a means of ingress and egress,[7] a communications system of some kind, the establishment of various camp sites, the importation of food, clothing, etc., power lines and the modification to a greater or lesser extent of the environment. Should minerals be discovered in commercially productive quantities and be amenable to open pit mining as in other locations in Minnesota or as in taconite sites, the purpose and values of almost the entire BWCA is lost. The same is true, but to somewhat lesser degree, should any mining be done in the conventional underground method. In either event, access as by railroad, or highway is necessary, areas of timber must be logged off, a water supply must be obtained and other wilderness interferences effected.

Congress itself defined a "wilderness area" in 16 U.S.C. § 1131(c):

> "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where

[7]Heavy machinery can hardly be brought in by canoe or foot, particularly with the necessary portages, nor can substantial quantities of material be removed without other means of transport.

man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation. . . ."

It is clear that wilderness and mining are incompatible. Wilderness exists because man has not yet intruded upon it. As the United States was settled and frontiers vanished, wilderness disappeared except for inaccessible or otherwise then commercially useless areas. As of today but few true wilderness areas remain. Once penetrated by civilization and man made activities, it cannot be regained for perhaps hundreds of years. The recovery period is meaningless for generations to come. The destruction is irreversible. So with mining, logging off and other activities, they are anathema to all wilderness values. Congress in the Wilderness Act, for instance, 16 U.S.C. § 1133(d)(2) above quoted, refers to mineral prospecting "if such activity is carried on in a manner compatible with the preservation of the wilderness environment". Other portions of the Act and the regulations use language of a similar import.

If the premise is accepted that mining activities and wilderness are opposing values and are anathema each to the other, then it would seem that in enacting the Wil-

derness Act Congress engaged in an exercise of futility if the court is to adopt the view that mineral rights prevail over wilderness objectives. A mineral resource developer cannot proceed without making use of the surface of the land. Any use of the surface for the exploration or extraction of minerals becomes an unreasonable use because the surface is no longer wilderness and is irreversibly and irretrievably destroyed for generations to come. Mineral development thus by its very definition cannot take place in a wilderness area; else it no longer is a wilderness area. It is of course necessary that mineral owners disturb the surface in order to enjoy the mineral estate. Generally and absent zoning or restrictions, a mineral owner may make a reasonable use of the surface. One has to reach the conclusion however that if the area is to remain true wilderness, there is no reasonable usage to which the surface can be put and still retain the area's character as wilderness. An open-pit mine for instance or an underground mine with resultant piles of slag or refuse and all equipment needed can never reasonably be undone. There is an inherent inconsistency in the Congressional Act and it falls in the lap of the court to determine which purpose Congress deemed most important and thus intended. In this court's opinion the Wilderness objectives override the contrary mineral right provision of the statute (and of necessity the regulations promulgated pursuant thereto). Otherwise, the Congressional Act is a nullity. It does not seem to this court that it can presume that Congress intended a nullity. Congress demands that the Wilderness remain inviolate and yet at the same time appears to allow mineral development. Which use should be paramount is the court's problem. To create wilderness and in the same breath to allow for its destruction could not have been the

real Congressional intent and a court should not construe or presume an Act of Congress to be meaningless if the alternative analysis is available. The court is aware of the general rule of construction that the specific controls the general and that the provision relating to mineral rights are more specific. Nevertheless, if the Act means anything, the BWCA was established by Congress to secure for future generations the beauty, pristine quality and primitiveness of one of the few remaining small areas of this Country.

It is argued that mere prospecting and drilling is in the nature of a minor interference. It is nevertheless an encroachment upon wilderness, what with its heavy machinery, the noise of its operation, necessity for water or land transportation, base camps, communication lines, etc. Further, prospecting is only worthwhile if something is found, and it would follow as an *a fortiori*, that removal of the ore is the next step requiring further encroachment and as this court stated earlier knocking out the very heart of the BWCA.

The State requests that the injunction lie "except as related to a national emergency." It contemplates the time may come "when it is apparent that mineral values are of such great public importance that the need for them cannot be ignored in the public interest". The difficulty the court has with this concept is one of definition. The terms are so broad that to include this in an injunctive decree is merely to breed a further law suit. It is not clear whether the "national emergency" would constitute for instance, a declaration of war by Congress, a civil uprising at home, or merely a shortage of metals requiring imports to meet local needs. If the term were "national survival" it might be more capable of definition, but even that is or would

be a matter of judgment at some time in the future. Presumably any definitive action by Congress in relation to BWCA or other wilderness areas unequivocably determining that the objectives and value of wilderness are to be relegated and secondary to mining interests and activities whether or not a "national emergency" exists will be controlling. Theoretically a "national emergency" could be extant having no particular relationship to mineral interests i.e., extensive destruction by floods, tornados, pestilence, etc. Congress can define and prescribe, but until it does so, for the reasons above, the court declines to attempt to carve out a "national emergency" exception to the injunction.

A separate permanent injunction order has been entered.

APPENDIX C

NATIONAL WILDERNESS PRESERVATION ACT OF 1964

Public Law 88-577

AN ACT

To establish a National Wilderness Preservation System for the permanent good of the whole people, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Wilderness Act".

WILDERNESS SYSTEM ESTABLISHED STATEMENT OF POLICY

SEC. 2. (a) In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people

in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.

(b) The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress. No appropriation shall be available for the payment of expenses or salaries for the administration of the National Wilderness Preservation System as a separate unit nor shall any appropriations be available for additional personnel stated as being required solely for the purpose of managing or administering areas solely because they are included within the National Wilderness Preservation System.

DEFINITION OF WILDERNESS

(c) A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its nat-

ural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

NATIONAL WILDERNESS PRESERVATION SYSTEM—EXTENT OF SYSTEM

SEC. 3. (a) All areas within the national forests classified at least 30 days before the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness", "wild", or "canoe" are hereby designated as wilderness areas. The Secretary of Agriculture shall—

(1) Within one year after the effective date of this Act, file a map and legal description of each wilderness area with the Interior and Insular Affairs Committees of the United States Senate and the House of Representatives, and such descriptions shall have the same force and effect as if included in this Act: *Provided, however,* That correction of clerical and typographical errors in such legal descriptions and maps may be made.

(2) Maintain, available to the public, records pertaining to said wilderness areas, including maps and legal descriptions, copies of regulations governing them, copies of public notices of, and reports

submitted to Congress regarding pending additions, eliminations, or modifications. Maps, legal descriptions, and regulations pertaining to wilderness areas within their respective jurisdictions also shall be available to the public in the offices of regional foresters, national forest supervisors, and forest rangers.

(b) The Secretary of Agriculture shall, within ten years after the enactment of this Act, review, as to its suitability or nonsuitability for preservation as wilderness, each area in the national forests classified on the effective date of this Act by the Secretary of Agriculture or the Chief of the Forest Service as "primitive" and report his findings to the President. The President shall advise the United States Senate and House of Representatives of his recommendations with respect to the designation as "wilderness" or other reclassification of each area on which review has been completed, together with maps and a definition of boundaries. Such advice shall be given with respect to not less than one-third of all the areas now classified as "primitive" within three years after the enactment of this Act, not less than two-thirds within seven years after the enactment of this Act, and the remaining areas within ten years after the enactment of this Act. Each recommendation of the President for designation as "wilderness" shall become effective only if so provided by an Act of Congress. Areas classified as "primitive" on the effective date of this Act shall continue to be administered under the rules and regulations affecting such areas on the effective date of this Act until Congress has determined otherwise. Any such area may be increased in size by the President at the time he submits his recommendations to the Congress by not more than five thousand acres with no more

than one thousand two hundred and eighty acres of such increase in any one compact unit; if it is proposed to increase the size of any such area by more than five thousand acres or by more than one thousand two hundred and eighty acres in any one compact unit the increase in size shall not become effective until acted upon by Congress. Nothing herein contained shall limit the President in proposing, as part of his recommendations to Congress, the alternation of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value. Notwithstanding any other provisions of this Act, the Secretary of Agriculture may complete his review and delete such area as may be necessary, but not to exceed seven thousand acres, from the southern tip of the Gore Range-Eagles Nest Primitive Area, Colorado, if the Secretary determines that such action is in the public interest.

(c) Within ten years after the effective date of this Act the Secretary of the Interior shall review every roadless area of five thousand contiguous acres or more in the national parks, monuments and other units of the national park system and every such area of, and every roadless island within, the national wildlife refuses and game ranges, under his jurisdiction on the effective date of this Act and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendation with respect to the designation as wilderness of each such area or island on which review has been completed, together with a map thereof and a definition of its boundaries. Such

advice shall be given with respect to not less than one-third of the areas and islands to be reviewed under this subsection within three years after enactment of this Act, not less than two-thirds within seven years of enactment of this Act, and the remainder within ten years of enactment of this Act. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. Nothing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system.

(d)(1) The Secretary of Agriculture and the Secretary of the Interior shall, prior to submitting any recommendations to the President with respect to the suitability of any area for preservation as wilderness—

(A) give such public notice of the proposed action as they deem appropriate, including publication in the Federal Register and in a newspaper having general circulation in the area or areas in the vicinity of the affected land;

(B) hold a public hearing or hearings at a location or locations convenient to the area affected. The hearings shall be announced through such means as the respective Secretaries involved deem appropriate, including notices in the Federal Register and in newspapers of general circulation in the area: *Provided*, That if the lands involved are located in more than one State, at least one hearing shall be held in each State in which a portion of the land lies;

(C) at least thirty days before the date of a hear-

ing advise the Governor of each State and the governing board of each county, or in Alaska the borough, in which the lands are located, and Federal departments and agencies concerned, and invite such officials and Federal agencies to submit their views on the proposed action at the hearing or by no later than thirty days following the date of the hearing.

(2) Any views submitted to the appropriate Secretary under the provisions of (1) of this subsection with respect to any area shall be included with any recommendations to the President and to Congress with respect to such area.

(e) Any modification or adjustment of boundaries of any wilderness area shall be recommended by the appropriate Secretary after public notice of such proposal and public hearing or hearings as provided in subsection (d) of this section. The proposed modification or adjustment shall then be recommended with map and description thereof to the President. The President shall advise the United States Senate and the House of Representatives of his recommendations with respect to such modification or adjustment and such recommendations shall become effective only in the same manner as provided for in subsections (b) and (c) of this section.

USE OF WILDERNESS AREAS

SEC. 4. (a) The purposes of this Act are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and—

(1) Nothing in this Act shall be deemed to be

in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215).

(2) Nothing in this Act shall modify the restrictions and provisions of the Shipstead-Nolan Act (Public Law 539, Seventy-first Congress, July 10, 1930; 46 Stat. 1020), the Thye-Blatnik Act (Public Law 733, Eightieth Congress, June 22, 1948; 62 Stat. 568), and the Humphrey-Thye-Blatnik-Andresen Act (Public Law 607, Eighty-fourth Congress, June 22, 1956; 70 Stat. 326), as applying to the Superior National Forest or the regulations of the Secretary of Agriculture.

(3) Nothing in this Act shall modify the statutory authority under which units of the national park system are created. Further, the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this Act shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system in accordance with the Act of August 25, 1916, the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area, including, but not limited to, the Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 432 et seq.); section 3(2) of the Federal Power Act (16 U.S.C. 796(2)); and the Act of August 21, 1935 (49 Stat. 666; 16 U.S.C. 461 et seq.).

(b) Except as otherwise provided in this Act, each

agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

PROHIBITION OF CERTAIN USES

(c) Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

SPECIAL PROVISIONS

(d) The following special provisions are hereby made:

(1) Within wilderness areas designated by this Act the use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable. In addition, such measures may be taken as may be necessary in the control of fire, insects, and diseases, subject to such conditions as the Secretary deems desirable.

(2) Nothing in this Act shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources, if such activity is carried on in a manner compatible with the preservation of the wilderness environment. Furthermore, in accordance with such program as the Secretary of the Interior shall develop and conduct in consultation with the Secretary of Agriculture, such areas shall be surveyed on a planned, recurring basis consistent with the concept of wilderness preservation by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present; and the results of such surveys shall be made available to the public and submitted to the President and Congress.

(3) Notwithstanding any other provisions of this Act, until midnight December 31, 1983, the United States mining laws and all laws pertaining to mineral leasing shall, to the same extent as applicable prior to the effective date of this Act, extend to those national forest lands designated by this Act as "wilderness areas"; subject, however, to such reasonable regulations governing ingress and egress as may be prescribed by the Secretary of Agriculture consistent with the use of the land for mineral location and development and exploration, drilling, and production, and use of land for transmission lines, waterlines, telephone lines, or facilities necessary in exploring, drilling, producing, mining and processing operations, including where essential the use of mechanized ground or air equipment and restoration as near as practicable of the surface of the land disturbed in performing prospecting, location, and, in oil and gas leasing, discovery work, exploration, drilling, and production, as soon as they have served their purpose. Mining locations lying within the

boundaries of said wilderness areas shall be held and used solely for mining or processing operations and uses reasonably incident thereto; and hereafter, subject to valid existing rights, all patents issued under the mining laws of the United States affecting national forest lands designated by this Act as wilderness areas shall convey title to the mineral deposits within the claim, together with the right to cut and use so much of the mature timber therefrom as may be needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available, and if the timber is cut under sound principles of forest management as defined by the national forest rules and regulations, but each such patent shall reserve to the United States all title in or to the surface of the lands and products thereof, and no use of the surface of the claim or the resources therefrom not reasonably required for carrying on mining on prospecting shall be allowed except as otherwise expressly provided in this Act: *Provided*, That, unless hereafter specifically authorized, no patent within wilderness areas designated by this Act shall issue after December 31, 1983, except for the valid claims existing on or before December 31, 1983. Mining claims located after the effective date of this Act within the boundaries of wilderness areas designated by this Act shall create no rights in excess of those rights which may be patented under the provisions of this subsection. Mineral leases, permits, and licenses covering lands within national forest wilderness areas designated by this Act shall contain such reasonable stipulations as may be prescribed by the Secretary of Agriculture for the protection of the wilderness character of the land consistent with the use of the land for the purposes for which they are leased, permitted, or licensed. Subject

to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this Act as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from dispostion under all laws pertaining to mineral leasing and all amendments thereto.

(4) Within wilderness areas in the national forests designated by this Act, (1) the President may, within a specific area and in accordance with such regulations as he may deem desirable, authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to development and use thereof, upon his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial; and (2) the grazing of livestock, where established prior to the effective date of this Act, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture.

(5) Other provisions of this Act to the contrary notwithstanding, the management of the Boundary Waters Canoe Area, formerly designated as the Superior, Little Indian Sioux, and Caribou Roadless Areas, in the Superior National Forest, Minnesota, shall be in accordance with regulations established by the Secretary of Agriculture in accordance with the general purpose of maintaining, without unnecessary restrictions on other uses, including that of timber, the primitive character of the area, particularly in the vicinity of lakes, streams, and portages: *Provided*, That nothing in this Act shall preclude the continuance

within the area of any already estabiished use of motorboats.

(6) Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.

(7) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(8) Nothing in this Act shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests.

STATE AND PRIVATE LANDS WITHIN WILDERNESS AREAS

SEC. 5. (a) In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this Act as wilderness, such State or private owners shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: *Provided, however,* That the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinquishes or causes to be relinquished to the United States the mineral interest in the surrounded land.

(b) In any case where valid mining claims or other

valid occupancies are wholly within a designated national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to such surrounded areas by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.

(c) Subject to the appropriation of funds by Congress, the Secretary of Agriculture is authorized to acquire privately owned land within the perimeter of any area designated by this Act as wilderness if (1) the owner concurs in such acquisition or (2) the acquisition is specifically authorized by Congress.

GIFTS, BEQUESTS, AND CONTRIBUTIONS

SEC. 6. (a) The Secretary of Agriculture may accept gifts or bequests of land within wilderness areas designated by this Act for preservation as wilderness. The Secretary of Agriculture may also accept gifts or bequests of land adjacent to wilderness areas designated by this Act for preservation as wilderness if he has given sixty days advance notice thereof to the President of the Senate and the Speaker of the House of Representatives. Land accepted by the Secretary of Agriculture under this section shall become part of the wilderness area involved. Regulations with regard to any such land may be in accordance with such agreements, consistent with the policy of this Act, as are made at the time of such gift, or such conditions, consistent with such policy, as may be included in, and accepted with, such bequest.

(b) The Secretary of Agriculture or the Secretary of the Interior is authorized to accept private contributions and gifts to be used to further the purposes of this Act.

ANNUAL REPORTS

SEC. 7. At the opening of each session of Congress, the Secretaries of Agriculture and Interior shall jointly report to the President for transmission to Congress on the status of the wilderness system, including a list and descriptions of the areas in the system, regulations in effect, and other pertinent information, together with any recommendations they may care to make.

Approved September 3, 1964.

SHIPSTEAD-NEWTON-NOLAN ACT

CHAP. 881.—An Act To promote the better protection and highest public use of lands of the United States and adjacent lands and waters in northern Minnesota for the production of forest products, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all public lands of the United States situated north of township 60 north in the Counties of Cook and Lake, State of Minnesota, including the natural shore lines of Lake Superior within such area; all public lands of the United States situated in that part of St. Louis County, State of Minnesota, lying north of a line beginning at the northeast corner of Township 63 north, Range 12 west, 4th P.M., thence westerly along the township line to the southwest corner of Township 64 north, Range 18 west, 4th P.M., thence northerly to the northwest corner of Township 65 north, Range 18 west, 4th P.M., thence westerly to the southwest corner, Township 66 north, Range 21 west, 4th P.M., thence northerly along the Township line to its intersection with the international boundary between the United States and the Dominion of Canada; all public

lands of the United States on the shore lines of the lakes and streams forming the international boundary, so far as such lands lie within the areas heretofore described in this Act; all public lands of the United States in that part of the Superior National Forest located in Townships 61 and 62, Ranges 12 and 13 west, 4th P.M.; and all public lands of the United States on the shore lines of Burntside Lake and Lake Vermillon, State of Minnesota, are hereby withdrawn from all forms of entry or appropriation under the public land laws of the United States, subject to prior existing legal rights initiated under the public land laws, so long as such claims are maintained as required by the applicable law or laws and subject to such permits and licenses as may be granted or issued by the Department of Agriculture under laws or regulations generally applicable to national forests.

Sec. 2. That the principle of conserving the natural beauty of shore lines for recreational use shall apply to all Federal lands which border upon any boundary lake or stream contiguous to this area, or any other lake or stream within this area which is now or eventually to be in general use for boat or canoe travel, and that for the purpose of carrying out this principle logging of all such shores to a depth of four hundred feet from the natural water line is hereby forbidden, except as the Forest Service of the Department of Agriculture may see fit in particular instances to vary the distance for practical reasons: *Provided*, That in no case shall logging of any timber other than diseased, insect infested, dying, or dead be permitted closer to the natural shore line than two hundred feet, except where necessary to open areas for banking grounds, landings, and other uses connected with logging operations.

SEC. 3. That in order to preserve the shore lines, rapids, waterfalls, beaches, and other natural features of the region in an unmodified state of nature, no further alteration of the natural water level of any lake or stream within or bordering upon the designated area shall be authorized by any permit, license, lease, or other authorization granted by any official or commission of the United States, which will result in flooding lands of the United States within or immediately adjacent to the Superior National Forest, unless and until specific authority for granting such permit, license, lease, or other authorization shall have first been obtained by special Act from the Congress of the United States covering each such project: *Provided*, That nothing in this section shall be construed as interfering with the duties of the International Joint Commission created pursuant to the convention concerning the boundary waters between the United States and Canada and concluded between the United States and Great Britain on January 11, 1909, and action taken or to be taken in accordance with provisions of the convention protocol and agreement between the United States and Canada, which were signed at Washington on February 24, 1925, for the purpose of regulating the levels of the Lake of the Woods; *Provided*, That with the written approval and consent of the Forest Service of the Department of Agriculture, reservoirs not exceeding one hundred acres in area may be constructed and maintained for the transportation of logs or in connection with authorized recreational uses of national-forest lands, and maximum water levels not higher than the normal high water mark may be maintained temporarily where essential strictly for logging purposes, in the streams between lakes by the construction and operation of small temporary dams: *Provided, however*, That

nothing herein shall be construed to prevent the Secretary of Agriculture from listing for homestead entry under the provisions of the Act of June 11, 1906 (34 Stat. 233), any of the above-described lands found by him to be chiefly valuable, for agriculture and not needed for public purposes: *Provided further*, That the provisions of this section shall not apply to any proposed development for water-power purposes for which an application for license was pending under the terms of the Federal Water Power Act on or before January 1, 1928.

Approved, July 10, 1930.

THYE-BLATNIK ACT

[CHAPTER 593]

AN ACT

To safeguard and consolidate certain areas of exceptional public value within the Superior National Forest, State of Minnesota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to protect and administer more effectively the publicly owned lands within certain parts of the area described in section 1 of the Act approved July 10, 1930 (46 Stat. 1020), and to accomplish certain public purposes explicit and implicit in sections 2 and 3 of said Act, the Secretary of Agriculture is authorized and directed to acquire any lands or interest in lands, and appurtenances thereto, situated within the area described in section 2 of this Act, where in his opinion development or exploitation, or the potentialities for development or exploitation, impair or threaten to impair the unique quali-

ties and natural features of the remaining wilderness canoe country: *Provided, however,* That under the authority of this Act no contiguous tract of land in one ownership, not exceeding five hundred acres in the aggregate, shall be condemned if at the time of the approval of this Act it is encumbered with a structure or structures of a permanent type suitable for human occupancy and if the owner thereof files written objections before expiration of the time for answering the petition in the proceedings.

SEC. 2. That the authority granted in section 1 of this Act shall be supplemental to the authority granted by existing Acts relating to the acquisition of lands for national-forest purposes and shall not be deemed as repealing any portions of those Acts except as provided hereinafter; and said supplemental authority granted by section 1 of this Act, but not the authority granted by existing Acts, shall be confined to the following described areas in Cook, Lake, and Saint Louis Counties, State of Minnesota:

* * *

SEC. 3. That lands shall be acquired by purchase or condemnation under the supplemental authority granted in section 1 of this Act only with prior approval of the National Forest Reservation Commission created by section 4 of the Act approved March 1, 1911 (36 Stat. 961), as amended, and lands so acquired shall become parts of the Superior National Forest and be subject to the provisions of said Act (36 Stat. 961), as amended, and of such other laws as apply to land acquired under the provisions of said Act (36 Stat. 961), as amended, except as hereinafter provided.

SEC. 4. That upon finding and determination by the

Secretary of Agriculture that the public purposes and objectives explicit and implicit in the Act approved July 10, 1930 (46 Stat. 1020), more effectively can be accomplished by exchanging lands of the United States situated within the boundaries described in said Act for other lands in State, county, or private ownership situated within the said boundaries which are more suitable for public ownership, management, and use, for the purposes contemplated by said Act, such lands of the United States shall be subject to exchange under the provisions of the Act of March 20, 1922 (42 Stat. 465), as amended, or the provisions of the Act of March 3, 1925 (43 Stat. 1215).

SEC. 5. That the Secretary of the Treasury, upon the certification of the Secretary of Agriculture, shall pay to the State of Minnesota, at the close of each fiscal year from any national-forest receipts not otherwise appropriated a sum of money equivalent to three-quarters of 1 per centum of the fair appraised value of such national-forest lands as may be situated within the area described in section 2 of this Act at the end of each fiscal year; and the payments made hereunder shall be distributed to each of the three aforesaid counties in conformity with the fair appraised value of such national-forest lands in each county: *Provided*, That the fair appraised value of the lands shall be determined by the Secretary of Agriculture at ten-year intervals and his determination shall be conclusive and final: *Provided further*, That the first payment to the State of Minnesota under the provisions of this section shall not be due until the close of the first full fiscal year after approval of this Act: *And provided further*, That the provisions of the Act of May 23, 1908 (35 Stat. 260), and of section 13 of the Act of March 1, 1911,

as amended (36 Stat. 961; 38 Stat. 441) shall not be applicable to the national-forest lands to which this section applies.

SEC. 6. That there are hereby authorized to be appropriated annually such sums as are necessary to carry out the provisions of this Act: *Provided, however,* That the total appropriations under the authority of this Act shall not exceed $500,000 for the purchase and condemnation of land.

Approved June 22, 1948.

HUMPHREY—THYE—BLATNIK—ANDRESEN ACT

Public Law 607 CHAPTER 425

AN ACT

To amend the Act of June 22, 1948 (62 Stat. 568), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, except as hereinafter provided, the provisions of the Act approved June 22, 1948 (62 Stat. 568), are hereby extended and made applicable to the following described lands:

* * *

SEC. 2. With respect to the lands described in section 1 of this Act, the second proviso of section 5 of the aforementioned Act of June 22, 1948 is hereby revised to read as follows: "*Provided further,* That the first payment to the State of Minnesota under the provisions of this section shall be due at the close of the fiscal year 1959."

SEC 3. Section 6 of the aforementioned Act of June 22, 1948, is hereby amended by striking the figure "$500,000" and inserting in lieu thereof the figure "$2,500,000".

Approved June 22, 1956.

MINN. STAT. § 1.041

CONCURRENT JURISDICTION OF STATE AND UNITED STATES. Subdivision 1. Rights of State. Except as otherwise expressly provided the jurisdiction of the United States over any land or other property within this state now owned or hereafter acquired for national purposes is concurrent with and subject to the jurisdiction and right of the state to cause its civil and criminal process to be executed therein to punish offenses against its laws committed therein, and to protect, regulate, control and dispose of any property of the state therein.

Subd. 2. Land exchange commission may concur. In any case not otherwise provided for, the consent of the State of Minnesota to the acquisition by the United States of any land or right or interest therein, in this state desired for any authorized national purpose, with concurrent jurisdiction as defined in subdivision 1, may be given by concurrence of a majority of the members of the Land Exchange Commission created by the Constitution of the State of Minnesota, Article 8, Section 7, upon finding that such acquisition and the methods thereof and the exercise of such jurisdiction are consistent with the best interests of the state, provided application for such consent is made by an authorized officer of the United States, setting forth a description of the property, with a map when necessary for proper identification thereof, and the authority for, purpose of, and method used or to be used in

acquiring the same. The commission may prescribe the use of any specified method of acquisition as a condition of such consent.

In case of acquisition by purchase or gift, such consent shall be obtained prior to the execution of any instrument conveying the lands involved or any interest therein to the United States. In case of condemnation, such consent shall be obtained prior to the commencement of any proceeding therefor.

MINN. STAT. § 1.045

STATE, CONSENT TO ACQUISITION OF LANDS. Consent of the State of Minnesota is given to the acquisition by the United States in any manner authorized by act of congress of lands lying within the original boundaries of the Chippewa National Forest and the Superior National Forest for any purpose incident to the development or maintenance of those forests, subject to concurrent jurisdiction of the state and the United States as defined in section 1.041.

MINN. STAT. §§ 84.43-84.521

84.43 DEFINITIONS. Subdivision 1. The definitions given in this section shall govern for the purposes of sections 84.43 to 84.52 unless a different meaning is clearly indicated by the language or context.

Subd. 2. "Wilderness Area" shall mean any of the following areas or parts thereof:

(1) All those portions of the Superior National Forest described in Section 2 of Public Law 733, 80th Congress, approved June 22, 1948, and all public waters included therein or bordering thereon except the following: Crane

Lake, Moose Lake in Township 64 North, Range 9 West, Snow Bank Lake, Sawbill Lake, Brule Lake, Big Lake in Township 64 and 65 North, Range 13 West, Saganaga Lake, Seagull Lake, Clearwater Lake in Township 65 North, Range 1 East, and East Bearskin Lake in Township 64 North, Range 1 East and Range 1 West:

(2) Such other areas as may be designated by the commissioner of natural resources as hereinafter provided within the present boundaries of the Superior National Forest and the Kabetogama and Pigeon River purchase units thereof as heretofore established by federal authority and not less than five miles from any public highway.

Subd. 3. "Public waters" shall mean all waters lying wholly within the state and all portions of boundary waters within the jurisdiction of the state contained within any wilderness areas designated hereunder and which the public have a right to use for navigation, fishing, hunting or any other beneficial public use.

Subd. 4. "Aircraft" shall mean any contrivance now known or hereafter invented and used or designed for navigation or flight in the air.

84.44 DECLARATION OF POLICY. It is hereby declared that regulation and control of the operation of aircraft and watercraft upon or over any wilderness area and public waters therein is necessary for the protection and promotion of public health, safety and welfare and other interests of the public therein and for the protection and conservation of natural wilderness conditions and other natural resources therein for the public benefit.

84.45 COMMISSIONER, POWERS AND DUTIES. The commissioner of natural resources shall have power

and it shall be his duty to designate such wilderness areas within the limits hereinbefore authorized as he shall determine after investigation to be necessary for the purposes of sections 84.43 to 84.52, and to add to, withdraw from, or otherwise modify such designations from time to time as the fulfillment of such purposes may require. Such designations shall be made by regulations adopted as provided by and subject to the laws relating to regulations of administrative agencies of the state, and may be modified or rescinded in like manner; provided, that in addition to or in connection with the proceedings required under said laws, the commissioner of natural resources or his authorized agent shall hold a public hearing on any proposal for a designation or a change therein hereunder at a place designated by him in a county containing lands affected thereby, of which at least two weeks published notice shall be given in each county affected, and at least 30 days notice shall be given by mail to the county auditor of each such county.

84.46 COMMISSIONER OF AERONAUTICS; AIRCRAFT CHECKING STATIONS. Subdivision 1. The commissioner of aeronautics shall have power and it shall be his duty as soon as practicable after the passage of Laws 1949, Chapter 630, to designate as aircraft checking stations at least three airports having suitable facilities for the landing of aircraft equipped for flying and landing in wilderness areas. Such checking stations shall be located so as to cover the commonly used approaches to such wilderness areas by air from all sides, as far as practicable, and each such station shall be within 100 miles of the nearest point on the boundary of such wilderness areas. The designation of such checking stations shall be made by regulations adopted as provided by and subject to the

laws relating to regulations of the commissioner of aeronautics, and may be modified or re-cinded in like manner from time to time as may be necessary for the purposes of sections 84.43 to 84.52. The commissioner of natural resources shall appoint attendants for such checking stations and shall prescribe their powers and duties, subject to the provisions hereof. Officers or employees of other state departments or governmental subdivisions of the state may be appointed as such attendants with the approval of their appointing authorities.

Subd. 2. The provisions of this subdivision shall apply to all aircraft and pilots thereof except as otherwise provided herein. From and after the designation of not less than three checking stations as hereinbefore provided, no such aircraft pilot shall fly an aircraft into or over any wilderness area at a height less than 2,000 feet from the ground, except as may be necessary for safety, without first landing at a checking station designated hereunder and making a written report to the attendant, on a form prescribed by the commissioner of conservation, containing the following information: type and federal registration number of the aircraft; name, address, and license number of the pilot; names and addresses of the passengers; purpose of flight; proposed line of flight and destination within the wilderness areas; proposed period of stay therein, and proposed checking station for reporting on departure therefrom. The attendant shall deliver to the pilot a countersigned copy of the report, which the pilot shall retain in his possession at all times while in the wilderness areas on the trip covered thereby. During the period of such trip as stated in the report, the aircraft shall not be operated, landed, or kept at any place within the wilderness areas except as specified in the report, and shall not remain

within such areas after the expiration of such period. Upon leaving such areas at any time after entering the same, the pilot, before landing the aircraft at any other place, shall immediately proceed to and land at the checking station designated for checking out in his report, and shall check out by submitting his copy of the report to the attendant, who shall endorse the same to show such checking-out and return the same to the pilot; provided, that if by reason of weather conditions or otherwise it is impracticable for the pilot to check out at the station designated in the report, he may check out at any other checking station established hereunder, submitting a written statement of his reasons therefor. All records made hereunder shall be kept on file at the checking stations, and shall be subject to inspection by the commissioner of aeronautics, the commissioner of natural resources, or their authorized agents, and by any conservation officer or other law enforcement officer.

Subd. 3. The provisions of sections 84.43 to 84.52 shall not apply to the use of aircraft by any officer or agency of the state or of the United States for any authorized public purpose.

Subd. 4. The provisions of sections 84.43 to 84.52 shall not prohibit or prevent the operation or landing of any aircraft within any such area so far as may be necessary to save life or property or prevent substantial injury thereto in an emergency.

84.47 PERMITS TO PRIVATE PROPERTY OWNERS. Subdivision 1. In case there shall be any private property situated within any such area and such private property, at the time such area is designated, is improved and used for purposes for which air transportation is essential, written permits shall be issued by the commissioner

of aeronautics which shall authorize the operation of aircraft without check in or check out for the transportation of persons, their lawful possessions and materials to such extent as is necessary for the continuation of the use of the property affected existing at the time of the designation of the area, such permits to be issued upon the following conditions:

(a) The owner, lessee or operator of such private property shall have a licensed seaplane base on or adjacent to his property.

(b) Such permits shall thereupon be issued to the owner or operator of any aircraft to fly to, from, and between such bases and such other points as may be designated in the permit, provided such aircraft owner or operator has first complied with reasonable standards as to safety, equipment, and insurance to be established by the commissioner of aeronautics as provided by law.

(c) If the private property affected is situated in a wilderness area designated by the commissioner of natural resources as hereinbefore provided, a permit shall be issued for such aircraft operation as may be necessary for the continuation of any lawful use of the property; whether existing at the time of the designation of such area or thereafter developed.

(d) A permit shall be effective until the end of the calendar year in which it is issued, and shall be renewable annually upon the continued existence of the conditions authorizing its original issue. Every permit shall be subject to suspension or revocation, as the commissioner of aeronautics shall determine, upon conviction of the permittee of any violation of the provisions of sections 84.43 to 84.52.

(e) Every holder of a permit hereunder shall keep daily written records in duplicate, on forms prescribed by the commissioner of natural resources, of all aircraft operations under the permit, containing the following information as to each flight, in addition to such other information as may be required by law or by regulations of the commissioner of natural resources: type and federal registration number of the aircraft; name, address, and license number of the pilot; names and addresses of passengers; purposes of flight, place, date, and time of beginning and termination of flight, line of flight and destinations. On or before the fifth of each month the permittee shall mail one of the duplicates of such records for all flights during the preceding calendar month to the commissioner of natural resources, who shall keep the same on file and subject to inspection in like manner as hereinbefore provided for inspection of copies of reports at checking stations.

Subd. 2. Any aircraft owner or operator carrying passengers for hire from a licensed seaplane base outside of the wilderness areas may obtain a permit in like manner as hereinbefore provided for operating between such base or other points outside of such areas, to be designated in the permit, and any points within such areas, subject to compliance with the requirements for keeping and mailing records and all other conditions pertaining to permits as hereinbefore prescribed, so far as applicable.

84.48 TWO-WAY RADIO SYSTEM. No aircraft shall fly into or over any such area except at the altitudes authorized in section 84.46, without being equipped with a two-way radio system, provided that this requirement shall not become effective until prescribed by order of the commissioner of aeronautics and provided further that when

it has been so prescribed, the operator of each such aircraft shall report his presence and location by radio to such station as may be designated by the commissioner of aeronautics and at such times during his stay within the area as the commissioner of aeronautics may prescribe. Orders of the commissioner of aeronautics under this section shall be prescribed by regulations adopted, modified, or rescinded as may be necessary for the purposes of sections 84.43 to 84.52 in accordance with the laws relating to his regulations in other cases.

84.49 WATER CRAFT, LIMITATION OF OPERATION. No aircraft pilot, owner or operator shall keep or maintain within any wilderness area designated hereunder, any boat, canoe or other watercraft at any point within such area except at private property encumbered with a structure or structures suitable for human occupancy, or unless in the immediate possession and control of a person authorized by the owner to so possess and control it. Any boat, canoe or other watercraft not so maintained, possessed or controlled shall be deemed contraband and be subject to confiscation in the name of the state by any state conservation officer or peace officer and shall be disposed of in the same manner as other property confiscated by the director of game and fish.

84.50 VIOLATIONS AND PENALTIES. Violation of any provision of sections 84.43 to 84.52 shall be a misdemeanor, and any court imposing sentence shall be authorized upon recommendation of the commissioner of aeronautics to prohibit the pilot so convicted from operating an aircraft within the state for a period not exceeding one year.

84.51 INSPECTION. Every aircraft while landed at

a checking station to report as herein provided shall be subject to inspection by the commissioner of natural resources or his authorized agents, or by any conservation officer, any of whom may, without a warrant, examine and search such aircraft for wild animals illegally taken or possessed or for other things declared contraband by the laws relating to wild animals, and may seize and confiscate in the name of the state any such contraband which may thereupon be found.

84.52 CERTAIN ZONING REGULATIONS APPLICABLE. Nothing herein contained shall authorize interference or conflict with the operation of any airport or other aeronautics facilities authorized, constructed, or maintained under any law, nor so as to interfere or conflict with any zoning regulations or any other regulations relating to aeronautics prescribed by or adopted pursuant to any other law.

84.521 SUSPENSION OF SECTIONS 84.43 TO 84.52. The operation of Minnesota Statutes 1949, Sections 84.43 to 84.52, is hereby temporarily suspended, which suspension shall be effective during such time as Executive Order 10092, issued December 20, 1949, by the President of the United States remains in effect.

MINN. STAT. § 92.45

STATE LAND ON MEANDERED LAKES WITHDRAWN FROM SALE; EXCEPTION. All state lands bordering on or adjacent to meandered lakes and other public waters and watercourses and the live timber growing or being thereon hereby are withdrawn from sale except as hereinafter provided. The commissioner of natural resources may sell any such timber as otherwise provided

by law for cutting and removal under such conditions as he shall prescribe in accordance with approved, sustained-yield forestry practices. He shall reserve such timber and impose such other conditions as he deems necessary for the protection of watersheds, wildlife habitat, shorelines, and scenic features. Within the area in Cook, Lake, and St. Louis counties described in the Act of Congress approved July 10, 1930, (46 Stat. 1020), the timber on state lands shall be subject to like restrictions as are now imposed by said act on federal lands.

Of all such land bordering on or adjacent to meandered lakes and other public waters and watercourses and so withdrawn from sale, a strip two rods in width, the ordinary high-water mark being the water side boundary thereof, and the land-side boundary thereof being a line drawn parallel to the ordinary high-water mark and two rods distant landward therefrom, hereby is reserved for public travel thereon, and wherever the conformation of the shore line or conditions require the commissioner shall reserve a wider strip for such purposes.

Any such state lands bordering on or adjacent to the Mississippi River or any such lakes, waters, and watercourses in the bottom lands thereof, desired or needed by the United States government for, or in connection with, any project heretofore authorized by Congress for the improvement of navigation in the Mississippi River, may be sold by the commissioner at public sale according to law, as in other cases, upon application by a fully authorized United States official, setting forth a description of the land and transmitted with a map showing its location with reference to adjoining properties.

MINN. STAT. § 110.13

CONTROL OF SHORE LINES; VIOLATION. In order to preserve shore lines, rapids, waterfalls, beaches, and other natural features in an unmodified state of nature, no dam and no addition to any existing dam shall hereafter be constructed in or across any public stream or body of water within or bordering upon those portions of the area of Cook, Lake, and St. Louis counties designated in the act of congress of July 10, 1930 (Chapter 880), and no alteration of the natural water level or volume of flowage of any such stream or body of water shall be made and no easement for flooding or overflowing or otherwise affecting lands of the state of Minnesota adjacent thereto shall be granted, unless and until specific authority shall have first been obtained by an act of the legislature. With the written approval and consent of the department of natural resources, together with the signed authority of the executive council, dams for public recreational uses or dams essential for logging or for logging reservoirs that do not exceed 100 acres in extent may be constructed to maintain temporarily water levels not higher than the normal high-water marks. Every such approval shall be subject to suitable charges, time limitation, and other conditions designed fully to protect the public interest in the intent of this section. The provisions of this section shall not apply to that portion of any proposed development for water-power purposes now or heretofore actually occupied and maintained by any applicant for license to make such development under the terms of the federal water power act if the application for such license was pending on or before January 1, 1928. Such occupancy is hereby legalized and confirmed and such occupant is hereby granted the right to occupy and use for waterpower purposes, and so long as

required and used for such purposes, the state lands and waters now or heretofore so occupied and used up to an elevation not exceeding two feet above the lowest crest of the spillway or overflow dam of such occupant as now constructed; provided, that no water control structures shall be used higher than those now or heretofore used. The occupant shall pay to the state annually reasonable compensation for the use of the state lands affected, to be determined by the commissioner of natural resources after investigation. The occupant shall comply with the following requirement:

To pay the state promptly reasonably compensation for any further damage to state lands or timber heretofore or hereafter caused by such development, other than such as is covered by the compensation paid for the use of the lands as hereinbefore provided.

Any person who shall wilfully or knowingly violate any of the provisions of this section or of any order made thereunder by the department of natural resources shall be guilty of a gross misdemeanor.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-123

IZAAK WALTON LEAGUE OF AMERICA, ET AL., PETITIONERS

v.

GEORGE W. ST. CLAIR, EA AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 497 F. 2d 849. The opinion of the district court (Pet. App. B) is reported at 353 F. Supp. 698.

JURSIDICTION

The judgment of the court of appeals was entered on May 17, 1974. The petition for a writ of certiorari was filed on August 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly deferred consideration of the legality of proposed prospecting activities in the Boundary Waters Canoe Area, in the State of Minnesota, pending action by the United States Forest Service on the prospector's application for a permit to prospect.

STATUTE INVOLVED

The statute involved is the Wilderness Act, 78 Stat. 890, 16 U.S.C. 1131 *et seq.*, set forth in Pet. App. C at C-1 to C-15.

STATEMENT

The Izaak Walton League brought this action against a prospector and state and federal agencies to prevent prospecting by private individuals holding reserved mineral rights in the Boundary Waters Canoe Area of the Superior National Forest in northern Minnesota, on the ground that prospecting would be injurious to the wilderness character of the area. The district court enjoined officials of the United States Department of Agriculture from granting a pending application for a permit to prospect and enjoined the applicant and his successors in interest from exercising any reserved mineral rights. It also enjoined certain state officials from permitting the exercise of such rights (Pet. App. B, B-1 to B-3). The court of appeals reversed and remanded, holding that judicial review should be deferred pending action by the Forest Service on the application for a permit to prospect (Pet. App. A, A-11).

The Canoe Area comprises 1,031,204 acres along the Canadian border in the Superior National Forest in northern Minnesota. It was included in the National Wilderness System pursuant to the Wilderness Act, 16 U.S.C. 1131 *et seq.* The court of appeals described the ownership of the area as follows (Pet. App. A, A-4):

> Within the BWCA [the Canoe Area], the surface land area is owned in roughly the following percentages: United States, 71.3%; Minnesota, 26.3%; Minnesota counties, 1.4%; and private parties, 1%. This latter figure is steadily declining as more and more land passes from private to federal ownership. The ownership of the underlying mineral rights is in quite different proportions. The United States owns only 44%; the State and counties, the same 26.3% and 1.4% respectively; while the rights held by private owners amount to 28.3% of the total area.

Some of these mineral reservations were created by the deeds conveying the surface to the United States while other reservations had been previously created. Currently, the ownership of the reserved mineral rights is greatly fractionalized.[1]

The controversy was submitted to the district court upon stipulated facts. These were summarized by the court of appeals as follows (Pet. App. A, A-4 to A-5; footnote omitted):

> St. Clair [the prospector], through various lease agreements, accumulated the mineral rights in approximately 150,000 acres of BWCA land, and in 1969 had crews enter the BWCA for preliminary exploratory work. With the permission of the Forest Service, his crew established a base camp, and traveling by canoe undertook surface mineral exploration. Appar-

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[1]By virtue of the checkerboard character of state and federal ownership, a state permit would be required for private prospecting activities of any size. The State of Minnesota bars any such activities except in the event of an emergency (Pet. App. B, B-36 to B-37). The regulations in 36 C.F.R. 251.1(b)(2) require Forest Service special use permittees to comply with all applicable state laws.

> ently encouraged by the preliminary findings, St. Clair notified the Forest Service in December, 1969, of his intention to send a drill and crew into the BWCA in late December or early January, 1970, to drill four or five test holes.
>
> The Forest Service, in response, notified St. Clair that before any permit could be issued he would have to furnish the documents establishing his claimed rights, and that the Forest Service would be looking for any possible way to keep him from carrying out his planned activities in the BWCA. This lawsuit was commenced before St. Clair furnished the requested documentation; the Forest Service still has not received the necessary documents; and no administrative determination has been made as to whether a permit should be granted. There have been no additional exploratory activities during the pendency of this lawsuit.

The district court issued a memorandum decision (Pet. App. B, B-4 to B-37) in which it took "judicial notice" that mineral exploration would be destructive of the wilderness character of the Canoe Area (Pet. App. B, B-31, B-33). It also permanently enjoined federal and state officials and the named holders of reserved mineral rights from permitting or undertaking further mineral exploration or exploitation (Pet. App. B, B-1 to B-3).

The court of appeals reversed, holding (Pet. App. A, A-9):

> Rather than taking "judicial notice" that St. Clair's planned activities were incompatible with the wilderness quality of the BWCA, without a hearing and without the benefit of a Forest Service record on the question, the District Court should have stayed the proceedings until after Forest Service action on the permit application, or dismissed the case without

> prejudice to any suit commenced after final Forest Service action. Although the League's legal claims cannot be decided by the Forest Service, recourse to the courts will be available after final Forest Service action. Allowing the Forest Service to initially determine whether any mining activity will be allowed, consistent with maintaining the wilderness character of the BWCA, would provide the necessary factual record for the District Court's determination of the legal issues presented.

The court of appeals concluded (Pet. App. A, A-11):

> The cause is reversed and remanded with directions that the Forest Service be allowed to determine, upon proper application, whether a permit should be granted; and, of course, St. Clair is not at liberty to explore or prospect without a permit from the Forest Service. The District Court may, in its discretion, stay proceedings in the present suit or dismiss without prejudice to any later action.

ARGUMENT

The decision is correct and does not conflict with any decision of this Court or any other court. Moreover, review by this Court at this time would be inappropriate because no final adjudication of rights has been made.

1. Contrary to the suggestion by petitioners, the issue is not whether Congress can prohibit prospecting on federal lands. It clearly can do so. But, as the court of appeals recognized (Pet. App. A, A-8 to A-9), the Wilderness Act permits mineral prospecting and other activities in wilderness areas "if such activity is carried on in a manner compatible with the preservation of the wilderness environment." 16 U.S.C. 1133(d)(2). The Act further provides that the Secretary of Agriculture shall determine

the compatibility of the proposed activities with the wilderness character of the area involved. 16 U.S.C. 1133(d)(2), (d)(5). Under these circumstances, the court of appeals was correct in applying the doctrine of primary jurisdiction and in deferring judicial review until the Forest Service has had an opportunity to rule on St. Clair's application.

2. Moreover, at this stage, the controversy lacks elements of finality and concreteness. If following remand the Forest Service were to deny St. Clair's application, this lawsuit would be moot. On the other hand if the permit were granted, the type of prospecting which might be authorized by the Forest Service and its effect on the environment would be less speculative. Thus, the matter is not ripe for judicial review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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